

**REGULATION OF FIXED-TERM CONTRACTS UNDER THE SOUTH  
AFRICAN CONSUMER PROTECTION ACT 68 OF 2008**

by

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## **REGULATION OF FIXED-TERM CONTRACTS UNDER THE SOUTH AFRICAN CONSUMER PROTECTION ACT 68 OF 2008**

I declare that the above thesis is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I further declare that I have submitted the thesis to the originality checking software and that it falls within the accepted requirements for originality.

I further declare that I have not previously submitted this work, or part of it, for examination at Unisa for another qualification or at any other higher education institution.



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## SUMMARY

### English

In this thesis the position of parties under a fixed-term agreement under section 14 of the Consumer Protection Act 68 of 2008 is analysed critically. The purpose of this thesis is first to establish whether parties to a fixed-term agreement are better protected in terms of section 14 of the CPA when the consumer needs to terminate the contract based on the material failure to perform by the supplier, than under the common law. Second, this thesis explores whether the maximum duration of fixed-term agreements should be limited by statute. Various aspects affecting parties to these agreements, for instance the freedom to contract, *pacta servanda sunt*, and standard-form agreements, are considered. The South African position is then compared to the position in Singapore under the Consumer Protection (Fair Trading) Act, and to the United Kingdom under the Consumer Rights Act, to gain perspective and objectively evaluate the provisions of section 14 of the Consumer Protection Act 68 of 2008 to establish whether South Africa can benefit from lessons learnt from these jurisdictions. Finally, principle-based amendments to the provisions of the CPA are recommended to improve the position of the consumer under fixed-term agreements to effect best practice solutions and ensure adherence to the aims and purposes of the Consumer Protection Act 68 of 2008 and international guidelines.

This thesis is based on the law as at 18 June 2020, found in sources available in South Africa, and Singaporean law available in the database of the National University of Singapore.

### Key terms

Consumer Protection Act; common law; consumer protection; fixed-term agreement; standard-form agreement; inferior bargaining position; freedom of contract; material failure to perform; premature termination; reasonable cancellation penalty; vulnerable consumers; Consumer Protection (Fair Trading) Act; Consumer Rights Act

## Afrikaans

Hierdie proefskrif is 'n kritiese analise van die posisie van partye tot vastetermynkontrakte ingevolge artikel 14 van die Suid-Afrikaanse verbruikersbeskermingswetgewing, die Consumer Protection Act 68 van 2008 (CPA). Die doel van die analise is eerstens om vas te stel of partye tot 'n vastetermynkontrak ingevolge artikel 14 van die CPA beter beskerming geniet ingevolge die CPA wanneer die verbruiker die vastetermynkontrak moet beëindig weens die wesenlike wanprestasie deur die verskaffer, as ingevolge die gemeenereg. Tweedens ondersoek die proefskrif of dit wenslik is dat die maksimum duur van vastetermynkontrakte deur wetgewing beperk word. Verskeie aspekte wat die posisie van partye tot vastetermynkontrakte beïnvloed word ondersoek, onder andere kontrakteervryheid, die leerstuk *pacta servanda sunt* en standaardkontrakte. Die Suid-Afrikaanse posisie word dan vergelyk met dié in Singapoer, ingevolge die Consumer Protection (Fair Trading) Act (CPFTA), en die Verenigde Koninkryk, ingevolge die Consumer Rights Act (CRA) om perspektief te kry op die studie, en ten einde die bepalings van artikel 14 objektief te oorweeg om vas te stel of Suid-Afrika kan kersopsteek by hierdie jurisdiksies. Laastens word voorstelle gemaak om die posisie van die verbruiker tot vastetermynkontrakte ingevolge die CPA te verbeter om beste gebruikspraktyke te implementeer, en te verseker dat die doelwitte van die CPA en internasionale verbruikersriglyne bereik word.

Hierdie studie weerspieël die regsposisie soos op 18 Junie 2020 in bronne wat plaaslik beskikbaar is, asook in bronne aan my beskikbaar gestel deur die Nasionale Universiteit van Singapoer tydens 'n navorsingsbesoek daar.

## Isizulu

Kule thesisi isimo sezinhlangano ezingaphansi kwesivumelwano sesikhathi esinqunyiwe, ngaphansi kwesigaba 14 koMthetho 68 ka 2008, uMthetho weZokuvikelwa koMthengi uhlaziywa ngendlela egxekayo. Inhlalo yalolu cwaningo ukusungula ukuthi mhlawumbe lezi zinhlangano ezingaphansi kwesivumelwano sesikhathi esinqunyiwe sivikeleke kangcono ngaphansi kwesigaba 14 se-CPA uma kunesidingo sabathengi sokuqedwa kwesivumelwano esencike phezu kokwehluleka ukwenza umsebenzi waloyo ongumthumeli wempahla, okwehlukile emthethweni owejwayelekile. Okwesibili, le thesis iphenya ukuthi mhlawumbe isikhathi isikhathi esinde sesivumelwano sesikhathi esinqunyiwe kufanele sincishiswe ngokomthetho oshayiwe. Izinto ezahlukahlukeni ezithinta lezi zivumelwano, njengesibonelo, inkululeko yokungena esivumelwaneni *pacta servanda sunt*, kanye nesivumelwano ezingaguquki, kuyizinto ezibhekwayo. Isimo seNingizimu Afrika siqhathaniswa nesimo sezwe laseSingapore ngaphansi koMthetho wezokuVikelwa kwabaThengi (*Fair Trading*), kanye nasezweni laseUnited Kingdom ngaphansi koMthetho owaMalungelo abaThengi, ukuthola umqondo kanye nokuhlola izimiso ngaphansi kwesigaba 14 soMthetho 68 ka 2008, uMthetho oVikela abaThengi ukuthola ukuthi ngabe iNingizimu Afrika kukhona ekuzuzile kwizifundo ezifundwe kulezi zakhiwo zemithetho. Okokugcina, izichibiyelo ezisuselwe kwimigomo mayelana nalokho okushiwo yi-CPA inconywe ukuthi yenze ngcono isimo sezinhlangano ezingaphansi kwezivumelwano zesikhathi esinqunyiwe ukuletha izisombululo ezingcono kanye nokuqinisekisa ukuthi kulandelwa izinhloso kanye nemisebenzi yoMthetho 68 ka 2008, okunguMthetho oVikela abaThengi kanye nemihlahlandlela yezizwe zomhlaba.

Lolu cwaningo lususelwe phezu komthetho kusukela mhla zi 18 uNhlangulana 2020, luyatholakala emithonjeni yaseNingizimu Afrika, kanye nomthetho waseSingapore uyatholakala emithonjeni yedatha yaseNational University of Singapore.

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- The National University of Singapore for their hospitality during my research in Singapore.

**LIST OF ABBREVIATIONS**

<i>ABLR</i>	<i>Australian Business Law Review</i>
AD	Appellate Division
ADR	Alternative Dispute Resolution
<i>Afr J Bus Manage</i>	<i>African Journal of Business Management</i>
ALA	Alienation of Land Act
ASA	All South African Law Reports
BC	Before Christ
BCLR	Butterworths Constitutional Law Reports
CASE	The Consumer Protection Association of Singapore
CC	Constitutional Court
CCR	Consumer Contracts (Information, Cancellation and Additional Charges) Regulations
CGSO	Consumer Goods and Services Ombud
<i>CILSA</i>	<i>Comparative and International Journal of Southern Africa</i>
CIPC	Companies and Intellectual Property Commission
Civ	Civil
<i>CLJ</i>	<i>Cambridge Law Journal</i>
CMA	Competition and Markets Authority
CMLR	Common Market Law Reports
<i>Colum L Rev</i>	<i>Columbia Law Review</i>
CPA	Consumer Protection Act
CPD	Cape Provincial Division
CPFTA	Consumer Protection (Fair Trading) Act
CPUT	Consumer Protection from Unfair Trading Regulations
CRA	Consumer Rights Act
<i>D</i>	<i>Digesta</i>
DEIC	Dutch East India Company or Vereenigde Oost Indische Compagnie (see also VOC)
DTA	Department of Trade and Industry (now known as the Department of Trade, Industry and Competition)
ECP	Eastern Cape High Court
EDL	Eastern Districts Local Division
EEC	European Economic Union
Eq	Equity Cases

EU	European Union
EWCA	England and Wales Court of Appeal
EWHC	High Court of England and Wales
FB	Free State High Court Bloemfontein
FICA	Financial Intelligence Centre Act
GDP	Gross Domestic Product
GG	<i>Government Gazette</i>
GN	Government Notice
Gen N	General Notice
GSJ	South Gauteng High Court, Johannesburg
<i>HLR</i>	<i>Harvard Law Review</i>
<i>IBM</i>	<i>International Business Management</i>
<i>ICLQ</i>	<i>International and Comparative Law Quarterly</i>
<i>IJPL</i>	<i>International Journal of Private Law</i>
<i>IJSPS</i>	<i>International Journal of Social Policy and Society</i>
<i>Int J Private Law</i>	<i>International Journal of Private Law</i>
<i>IRLR</i>	<i>Industrial Relations Law Reports</i>
<i>Islamabad LR</i>	<i>Islamabad Law Review</i>
<i>JAASSH</i>	<i>Journal of Asian and African Social Science and Humanities</i>
<i>JABR</i>	<i>Journal of Applied Business Research</i>
<i>JBL</i>	<i>Journal of Business Law</i>
<i>JCA</i>	<i>The Journal of Consumer Affairs</i>
<i>JCP</i>	<i>Journal of Consumer Policy</i>
<i>JCCLP</i>	<i>Journal of Corporate and Commercial Law &amp; Practice</i>
<i>JCP</i>	<i>Journal of Consumer Policy</i>
<i>JEMCL</i>	<i>Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht / Journal of European Market and Consumer Law</i>
<i>JHV</i>	<i>Journal of Human values</i>
<i>JIBLR</i>	<i>Journal of International Banking Law and Regulation</i>
<i>JILI</i>	<i>Journal of the Indian Law Institute</i>
<i>JICLT</i>	<i>Journal of International Commercial Law and Technology</i>
<i>JTCL</i>	<i>Journal of Texas Consumer Law</i>
<i>LQR</i>	<i>Law Quarterly Review</i>
<i>LS</i>	<i>Legal Studies</i>



MA	Misrepresentation Act
<i>Mich LR</i>	<i>Michigan Law Review</i>
MJSC	<i>Mediterranean Journal of Social Sciences</i>
MLR	<i>Modern Law Review</i>
n	footnote
NCA	National Credit Act
NCC	National Consumer Commission
<i>NCLR</i>	<i>North Carolina Law Review</i>
<i>NW</i>	<i>North Western Reporter</i>
OFT	Office of Fair Trading
para(s)	paragraph(s)
<i>PELJ</i>	<i>Potchefstroom Electronic Law Journal</i>
<i>PER</i>	<i>Potchefstroom Elektroniese Regsjoernaal</i>
<i>PG</i>	<i>Provincial Gazette</i>
PN	Provincial Notice
PSR	Consumer Rights (Payment Surcharges) Regulations
QB	Queens Bench
<i>QMLJ</i>	<i>Queen Mary Law Journal</i>
s(s)	section(s)
SA	South Africa
<i>SAJHR</i>	<i>South African Journal on Human Rights</i>
<i>SALJ</i>	<i>South African Law Journal</i>
<i>SAcLJ</i>	<i>Singapore Academy of Law Journal</i>
<i>SA Merc LJ</i>	<i>South African Mercantile Law Journal</i>
<i>SAPR/L</i>	<i>Suid-Afrika Publiekregtelike Studies or South African Public Law Studies</i> , since 2010 known as <i>Southern African Public Law</i>
SCA	Supreme Court of Appeal
SCT	Small Claims Tribunal
<i>SJLS</i>	<i>Singapore Journal of Legal Studies</i>
<i>Sing L Rev</i>	<i>Singapore Law Review</i>
<i>SLR</i>	<i>Stanford Law Review</i>
SMS	Short Message System
<i>Sol Jo</i>	<i>Solicitors Journal</i>
<i>Stell LR</i>	<i>Stellenbosch Law Review</i>
SWA	South West Africa (Namibia)

TCC	Tax and Chancery Chamber
<i>THRHR</i>	<i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg</i>
TSAR	<i>Tydskrif vir die Suid-Afrikaanse Reg</i>
UCPD	Unfair Commercial Practices Directive
UCTA	Unfair Contract Terms Act
UCTD	Unfair Contract Terms Directive
UK	United Kingdom
UKHL	United Kingdom House of Lords
UKSC	United Kingdom Supreme Court
UN	United Nations
<i>U Pitt L Rev</i>	<i>University of Pittsburgh Law Review</i>
USA	United States of America
UTCCR	Unfair Terms in Consumer Contracts Regulations
VOC	Vereenigde Oostindische Compagnie
WLD	Witwatersrand Local Division
<i>WLR</i>	<i>Washington Law Review</i>
<i>YLJ</i>	<i>Yale Law Journal</i>
ZACC	Constitutional Court of South Africa
ZASCA	Supreme Court of Appeal of South Africa
ZAWCHC	South Africa: Western Cape High Court, Cape Town

## **USE OF SOURCES AND TERMINOLOGY**

Internet sources, especially those referred to in chapter 5 that deal with Singapore may not be available to users, as access was granted to me while I was a visiting researcher at the National University of Singapore. Access to these sources was strictly limited to the duration of my visit. Internet sources could not be justified similar to usual text, and in some cases the long web references in footnotes will not seem neat - however, this is an inherent problem in the software used and the format of internet sources.

The terminology used in the specific jurisdiction analysed will be used as far as possible in a specific chapter, for instance trader, supplier or seller, purchaser, consumer, or lessor. The terms contract and agreement are also used interchangeably in this thesis. The spelling of 'time-share' is different in each jurisdiction. Therefore, I have used 'time-share' for purposes of uniformity throughout this thesis, except where specific legislation or terminology is quoted, in which case the spelling in the relevant jurisdiction's legislation is reflected.

In some instances, it was not possible to access the prescribed or usual form of reference of court judgments, and in these circumstances the reference of the source as found, is used.

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## CHAPTER ONE: Introduction

### 1.1 Introduction and background

The purpose of consumer protection legislation is to strike a balance between the rights and perceived vulnerabilities of the consumer on the one hand, and the rights and obligations of the supplier of goods or services on the other.<sup>1</sup> Consumer protection legislation aims, in the main, to give consumers the confidence to contract freely under regulated conditions.<sup>2</sup> But ill-considered consumer legislation could potentially be detrimental to the consumer and adversely affect established common-law principles intended to treat all parties to an agreement fairly.<sup>3</sup> Although the Consumer Protection Act 68 of 2008<sup>4</sup> regulates consumer law, consumer agreements are still governed by the common law unless specifically otherwise provided by legislation. It is further notable that section 2(10) of the CPA provides that, '[n]o provision of this Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law'.

The common law has developed over centuries and aims to treat all parties to a contract fairly.<sup>5</sup> Despite this laudable objective, the indiscriminate and strict enforcement of certain common-law maxims and principles can prejudice consumers.

The first common-law principle that could result in consumer exploitation is contractual freedom. Freedom of contract allows parties to decide, without interference, whether or not, with whom, and on what terms to contract. As consumers are generally in an unequal bargaining position compared to suppliers,<sup>6</sup> freedom of contract can lead to a take-it-or-leave-it situation for many consumers. This results in the consumer having limited or no freedom to negotiate individual contract terms to his or her benefit.

An important common-law principle aimed at preserving the sanctity of agreements,<sup>7</sup> is *pacta servanda sunt* – honour the agreement.<sup>8</sup> By encouraging

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<sup>1</sup> Department of Trade and Industry *Draft Green Paper on the Consumer Policy Framework* published in *Government Gazette* (hereafter GG) 26774 of 9 September 2004 under Government Notice 1957 of 2004 (hereafter *Green Paper*) 4; s 3(1)(b) of the Consumer Protection Act 68 of 2008 (hereafter the CPA); Barnard LLD 1.

<sup>2</sup> *Green Paper* 4.

<sup>3</sup> Du Preez (2009) TSAR 63; Stoop (2015) PER 1118.

<sup>4</sup> Hereafter CPA.

<sup>5</sup> See Ch 3 para 3.6; *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd and Another* 2016 (1) SA 621 (CC) para [37] (*Mighty Solutions*); *Pearl Assurance Co v Union Government* 1934 AD 563.

<sup>6</sup> For a discussion of inferior or unequal bargaining positions, see Ch 2 paras 2.4.2 and 2.5.

<sup>7</sup> Sharrock *Business Transactions* 94; Bradfield *Christie's Law of Contract* 12-13, 518-519, 548. The Appeal Court recently confirmed, interpreted, and applied this principle in *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 (2) SA 314 (SCA) para [32] (hereafter *Mohamed's Leisure*); Eiselen (1989) THRHR 517-523.

<sup>8</sup> Hiemstra & Gonin *Drietalige Regswoordeboek* 251.

parties to perform their contractual duties and obligations *pacta servanda sunt* further promotes legal certainty and predictability in business.<sup>9</sup> The fulfilment of a contract in case of a breach by either party, can take the form of specific performance, or the remedy of awarding damages as a substitute for performance.<sup>10</sup> Rescission of contracts is regarded as a serious remedy because it does not follow and apply the maxim *pacta servanda sunt* and is therefore limited to exceptional circumstances.<sup>11</sup> When *pacta servanda sunt* is enforced indiscriminately, consumers could be bound by contracts containing onerous conditions for an extended period.

*Caveat emptor*,<sup>12</sup> is a third, well-established common-law principle. Literally translated it means 'buyer beware' and can also negatively affect consumers in that given their inferior bargaining position,<sup>13</sup> their only option is to conclude the contract or to walk away, even while they are aware of potentially onerous terms and conditions. As many consumers are not financially able to pay cash for a purchase (eg, a cell phone) they have no choice but to enter into a standard-form agreement which might or might not suit their individual circumstances. Therefore, consumers can often not benefit from the maxim *caveat emptor* as they are not in a position to re-negotiate the prejudicial terms and conditions of a standard-form contract.

At common law, a contract comes into existence when two or more parties agree to its essential terms and so create rights and obligations resulting in a legally binding agreement.<sup>14</sup> In the normal course of business, an agreement terminates once the contracting parties have fulfilled the rights and obligations undertaken.<sup>15</sup> Breach of contract occurs when one or more of the parties to the agreement fails to fulfil the obligations undertaken as a result of repudiation, failure to perform, positive default, or when performance is prevented.<sup>16</sup> The common-law remedies for breach of

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<sup>9</sup> Bradfield *Christie's Law of Contract* 661; *Mohamed's Leisure* para [23]; Eiselen (1989) *THRHR* 517-523.

<sup>10</sup> Du Bois et al *Wille's Principles* 882-885; De Wet & Van Wyk *Kontraktereg* 189-192; Bradfield *Christie's Law of Contract* 616-618; *Mohamed's Leisure* para [23]. See the discussion in Ch 3 para 3.4.

<sup>11</sup> Du Bois et al *Wille's Principles* 877; Bradfield *Christie's Law of Contract* 619; *Mohamed's Leisure* para [32]. See the discussion of this aspect in Ch 3 paras 3.2.2 and 3.4.3 and Ch 4 paras 4.2.3.7 and par 4.4.5.

<sup>12</sup> Hiemstra & Gonin *Drietalige Regswoordeboek* 163.

<sup>13</sup> For a discussion of inferior or unequal bargaining positions see Ch 2 paras 2.4.2 and 2.5.

<sup>14</sup> Du Bois et al *Wille's Principles* 736; De Wet & Van Wyk *Kontraktereg* 7; Bradfield *Christie's Law of Contract* 28.

<sup>15</sup> Du Bois et al *Wille's Principles* 829; Bradfield *Christie's Law of Contract* 503; De Wet & Van Wyk *Kontraktereg* 3. Contracts can also terminate because of impossibility of performance in terms of the contract, insolvency or death of one of the parties, mutual agreement, effluxion of time, due notice, and merger, Glover *Kerr's Sale and Lease* 570-588.

<sup>16</sup> Du Bois et al *Wille's Principles* 858; De Wet & Van Wyk *Kontraktereg* 142; Bradfield *Christie's Law of Contract* 585. See the discussion in Ch 3 para 3.3.

contract are aimed either at the fulfilment of the contract (specific performance), or at its rescission.<sup>17</sup>

In the CPA an 'agreement' is defined as, 'an arrangement or understanding between two or more parties that purports to establish a relationship in law between or among them'.<sup>18</sup> The CPA differs conceptually from the common-law principle of *pacta servanda sunt* as can be seen in section 14 which regulates the premature termination of fixed-term contracts. Section 14(2)(b)(i) specifically provides that a consumer may cancel an agreement upon expiry, subject to section 14(3)(a); or at any other time by giving 20 days' notice to the supplier, again subject to subsections 14(3)(a) and (b). When a consumer cancels a fixed-term agreement because of the poor performance or lack of performance by the supplier, the consumer remains liable, under section 14(3), for amounts owing to the supplier up to the date of cancellation. The supplier may also impose a reasonable cancellation penalty in contemplation of the agreement running its term.<sup>19</sup> Section 14(3) may indeed prejudice a consumer if a supplier fails to perform or performs inadequately.

The CPA, therefore aims, amongst other objectives, to protect consumers against the shortcomings and strict interpretation and application of the common-law maxims freedom of contract, *pacta servanda sunt*, and *caveat emptor*.

## 1.2 Problem statement and research question

The problem researched in this thesis is whether the consumer in a fixed-term agreement under section 14 of the CPA is in a better position than he or she would be as party to a similar agreement under the common law. This thesis focuses, in the main, on two aspects of section 14. First, is a consumer who, based on poor or non-performance by the supplier, terminates a fixed-term contract prematurely under section 14(2)(b) of the CPA,<sup>20</sup> in a worse position than he or she would be when doing so under South African common law? And second, should the duration of fixed-term contracts be limited by statute?

<sup>17</sup> Du Bois et al *Wille's Principles* 872-875, 877-882; De Wet & Van Wyk *Kontraktereg* 188-211; Bradfield *Christie's Law of Contract* 616; Glover *Kerr's Sale and Lease* 149-151. See the discussion in Ch 3 paras 3.3 and 3.4.

<sup>18</sup> Section 1 CPA.

<sup>19</sup> Similar to the common-law 'roukoop', see De Wet & Van Wyk *Kontraktereg* 216.

<sup>20</sup> Section 2(10) provides that the CPA will not deprive a consumer of his common-law rights. In practice, a consumer will have to approach the ombud, consumer court, alternative dispute resolution, the Commission or the Tribunal, most of which are creatures of statute and in practice do not necessarily have the experience or knowledge to adjudicate on common-law issues or develop the common law. Therefore, it appears that the CPA does not assist the consumer in these circumstances to the same extent as it does the supplier by explicitly providing an express remedy (the consumer remains liable for amounts owed, and the supplier is entitled to a reasonable cancellation penalty) in s 14 in these circumstances. Section 69(d) further complicates the matter as that section provides that a consumer may only approach a court if all other remedies in terms of the national laws of South Africa have been exhausted. This naturally has time and cost implications that would discourage the ordinary consumer wanting to act upon, for instance, a cell phone or gym membership agreement, as the amount in question would not justify the legal costs. Also, see Sharrock (2010) *SA Merc LJ* 324.

To consider these and related issues objectively, I undertake a comparative study of the positions in Singapore and the United Kingdom<sup>21</sup> (both common-law systems). I evaluate the position of fixed-term contracts under the CPA to establish whether South Africa can learn from these jurisdictions' consumer protection legislation. Apart from their common-law systems, Singapore and the UK are suitable subjects for comparison in that both have modern consumer legislation adopted in the recent past.<sup>22</sup> Singapore regularly updates and amends its Consumer Protection (Fair Trading) Act (CPFTA),<sup>23</sup> and has recently expanded the mandate of its Competition and Consumer Commission to allow it to act more proactively.<sup>24</sup> The CPFTA, for example, specifically provides for a blacklist in section 11 of its Second Schedule which caters for terms that are so 'harsh, oppressive, or excessively one-sided so as to be unconscionable'. The Consumer Protection Association in Singapore (CASE) is very active; it advocates for amendments, releases consumer guides, and publishes a consumer magazine.<sup>25</sup>

The UK has recently consolidated its consumer protection legislation into a new Act – the Consumer Rights Act 2015 (CRA).<sup>26</sup> The CRA is intended to modernise consumer law and keep pace with technological advances.<sup>27</sup> In addition, European Union<sup>28</sup> law has been incorporated into UK law,<sup>29</sup> which has enriched UK law with EU Directives, Guidance on EU Directives and judgments from all countries within the EU.<sup>30</sup> Although neither Singapore nor the UK has a single provision specifically

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<sup>21</sup> Hereafter UK.

<sup>22</sup> Yu available at [www.legco.gov.hk/yr10-11/english/sec/library/1011in11-e.pdf](http://www.legco.gov.hk/yr10-11/english/sec/library/1011in11-e.pdf) (date of use: 10 May 2018).

<sup>23</sup> (Chapter 52A) Original Enactment 27 of 2003 came into operation on 1 March 2004.

<sup>24</sup> Chia available at <https://www.morganlewis.com/pubs/caveat-emptor-the-new-face-of-consumer-protection-in-singapore> (date of use: 23 June 2020); <https://www.cccs.gov.sg/about-cccs> (date of use: 23 June 2020).

<sup>25</sup> The organisation's website address is [https://www.case.org.sg/consumer\\_guides\\_cpfta.aspx](https://www.case.org.sg/consumer_guides_cpfta.aspx) (date of use: 10 May 2018).

<sup>26</sup> This Act came into operation on 1 October 2015.

<sup>27</sup> Conway 'The House of Commons *Briefing Paper* CBP6588' of 18 May 2017 1-8 available at <https://researchbriefings.files.parliament.uk/documents/SN06588/SN06588.pdf> (date of use: 10 May 2018).

<sup>28</sup> Hereafter EU. The EU is a European political and economic union established in 1993 when the Maastricht Treaty came into force. The EU has developed an internal EU market with standardised legislation. See <https://www.britannica.com/topic/European-Union> (date of use: 16 January 2020). The EU was preceded by the EEC that was established in 1957 by the Treaty of Rome. See <https://www.britannica.com/topic/European-Union/Creation-of-the-European-Economic-Community> (date of use: 16 January 2020).

<sup>29</sup> The UK incorporated EU law while still a member of the EU.

<sup>30</sup> As the UK was part of the EU, it remains to be seen how its exit from the Union will affect this position in future. The UK's decision to leave the EU will be referred to as Brexit. See <https://www.nytimes.com/interactive/2019/world/europe/what-is-brexit.html> (date of use: 21 June 2019); <https://en.wikipedia.org/wiki/Brexit> (date of use: 21 June 2019). For a general discussion of the effects of Brexit, see <https://www.fairobserver.com/region/europe/brexit-european-union-britain-united-kingdom-theresamay-uk-election-result-latest-europe-news-today-97421/> (date of use: 21 June 2019) and for an analysis of the legal implications of Brexit, see Gee et al <https://www.birmingham.ac.uk/Documents/collegeartslaw/law/iel/leaving-EU-legal-impact-brexit-gee-rubini-trybus.pdf> (date of use: 21 June 2019). This aspect is discussed in Ch 6 paras 6.1, and 6.3.1.



regulating fixed-term agreements in its consumer legislation, I will examine other provisions in their consumer legislation which regulate aspects covered by section 14 of the CPA. This perspective enables an objective analysis to establish the true purpose, role, effect, necessity and merit of section 14 of the CPA. In addition, this perspective further assists in considering whether general principle-based provisions in the CPA would fulfill the same purpose, and perhaps improve the position of parties in cases of early termination of the agreement based on breach by the supplier, and by not unnecessarily limiting the duration of fixed-term agreements.

### 1.3 *Research objectives*

In addressing the problem statement, and to answer the research questions posed above, section 14 is analysed under the following themes:

- The philosophy underlying the trend to protect consumers by introducing consumer protection legislation.
- The common-law position of parties to an agreement terminated prematurely by a consumer on the basis of the supplier's poor or non-performance.
- An analysis, evaluation, and critique of the legal position of the parties to an agreement when a consumer prematurely terminates a fixed-term contract under section 14 of the CPA based on the supplier's poor or non-performance.
- A comparison between the premature termination of an agreement under section 14 of the CPA and under common law and an evaluation of which better serves the consumer.
- An examination of whether the limitation on the duration of fixed-term contracts is advantageous to the parties to these contracts.
- An evaluation of whether the CPA achieves the purposes and aims stated in its preamble, in its section 3, in terms of the philosophy underpinning consumer protection, the *Green Paper*, and the introduction of the CPA in respect of fixed-term agreements.
- I compare the position of the South African consumer in these circumstances to those of consumers in Singapore and the UK respectively, to evaluate the fixed-term provisions under the CPA objectively.
- If necessary, I will make suitable recommendations for the amendment of section 14 of the CPA, or other relevant provisions that affect consumers in fixed-term contracts, in order to provide adequate protection for consumers under fixed-term contracts under the CPA.

Many factors potentially play a role in the interpretation and application of section 14 of the CPA. When these are not addressed directly in section 14, they are regarded as secondary themes and are set out under the scope and limitations below. Other matters that are unlikely to play a significant role in the position of

parties under fixed-term contracts are excluded from the thesis, and listed as such under the exclusions below.

#### 1.4 *Scope and limitations of the thesis*

The main focus of this thesis is section 14 of the CPA. However, before considering the position of consumers in fixed-term contracts under section 14 and the common law, it is important to reflect on the philosophy of, the arguments for, and the movement towards consumer protection legislation, both internationally and in South Africa.

The study then shifts to examine the position of the consumer and supplier in consumer-type agreements under the common law with due regard to the *Green Paper*, constitutional principles, and the purposes and aims of the CPA. An in-depth analysis of section 14 of the CPA follows, in which I study the positions of the consumer and the supplier on premature termination of a fixed-term contract, and highlight other aspects of the CPA relevant to fixed-term contracts.

Following this, I evaluate the provisions of the CPA by comparing the position of parties under section 14 of the CPA to that of parties in fixed-term agreements under consumer protection legislation in Singapore and the UK with reference to the duration of agreements, the right of the consumer to terminate the agreement due to breach of contract by the supplier, and other aspects affecting consumers in fixed-term agreements. Finally, I will conclude the thesis and propose amendments to the CPA to improve the position of consumers if necessary.

Although various factors, including but not limited to general principles of contract law, fairness, ubuntu,<sup>31</sup> and the Constitution may, in certain circumstances, play a role, these aspects are not considered in detail as they are neither expressly dealt with in section 14, nor generally of particular relevance to standard section 14 fixed-term agreements – eg, an agreement to purchase a cell-phone, or for the provision of airtime or similar services by the cell phone service provider. Other secondary aspects not considered in detail are the application, enforcement, and jurisdiction of enforcement agencies and the courts, public policy, and bona fides.

#### 1.5 *Exclusions*

Aspects of contract law – under both common law and legislation – which do not impact directly on section 14 agreements, are excluded. In the chapters dealing with Singapore and the UK, I discuss only those aspects or principles of the common law of contract pertinent to the regulation of fixed-term contracts.

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<sup>31</sup> Because ubuntu originated in South Africa, and is in one of the official languages, the word is not italicised in this thesis. Also see <https://www.lexico.com/definition/ubuntu> (date of use 18 June 2020).

## 1.6 Methodology

In this thesis the research takes the form of a literature review. Textbooks, statutes, journal articles, case law, dissertations, theses, online sources,<sup>32</sup> and other related materials have been consulted to research, analyse, comment on, study, and make legal comparison of the problem statement and research objectives so as to propose a possible solution to the problem.

## 1.7 The proposed structure of the research

Chapter 1 – provides a roadmap to this thesis by introducing the topic, stating the research question, objectives and scope, limitations, and exclusions.

Chapter 2 – offers a brief history and highlights the philosophy behind the protection of consumers and the trend to protect vulnerable consumers, before introducing the United Nations' guidelines for consumer protection.

Chapter 3 – is an analysis of the common-law position of consumers in South Africa who terminate a fixed-term agreement prematurely because of the poor or non-performance of the supplier. Chapter 3 also considers the duration of contracts.

Chapter 4 – is a critical analysis of the *Green Paper*, the purpose and aims of the CPA impacting directly on fixed-term contracts, section 14 of the CPA, and other relevant provisions in the CPA, to establish the advantages and disadvantages of the provisions of section 14. Chapter 4 will also consider whether section 14 has fulfilled the objectives, aims and purposes envisaged in the *Green Paper*, the preamble of the CPA, and section 3 of the CPA which sets out the purposes and policy of the CPA.

Chapter 5 – compares the situations in South Africa and Singapore.

Chapter 6 – consumers under fixed-term contracts in South Africa and the UK are compared.

Chapter 7 – summarises and concludes the thesis and offers recommendations for possible legislative amendments to improve the position of the consumer under fixed-term contracts where expedient.

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<sup>32</sup> The electronic references provided may in certain cases have been moved, or no longer be available. Regarding the electronic sources referred to in Ch 5 dealing with Singapore, these were kindly made available to me while I was a visiting researcher at the National University of Singapore, and are only available to registered students and researchers during the actual research or registration period at the University.

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## **CHAPTER TWO: The historical and philosophical context of consumer protection**

### *2.1 Introduction*

In this chapter I draw some early examples of measures for consumer protection from history to illustrate how timeless these concepts are, before considering general philosophical principles applicable to consumer protection. This leads me to detail the move from individualism – illustrated by the *laissez-faire* doctrine – to collectivism, which sees the rise of standard-form contracts. The focus then shifts to the ever-increasing use of standard-form contracts, and international attempts to control the content of these contracts via the United Nations ‘Guidelines for Consumer Protection’.<sup>1</sup>

Within the limited scope of this study, no exhaustive analysis of the history, theories, philosophies, and historical movements which contributed to the evolution of consumer protection law and standard-form contracts, is possible. I have, therefore, selected certain aspects which illustrate the principles and theories of consumer protection measures and highlight important developments that have a direct bearing on my thesis topic.<sup>2</sup>

### *2.2 Early history*

#### *2.2.1 Introduction*

Historically, one may discern a universal desire to act fairly and eliminate unconscionable trade practices in the interests of both suppliers and consumers. I have selected a few interesting and diverse historical texts to illustrate early manifestations of consumer protection in religious texts or moral codes. The importance of these measures is that although early, informal forms of consumer protection existed, they already show the areas of concern which over time developed into the consumer protection measures we know today. These measures are without exception based on honesty, fairness, justice, and the prevention of unconscionable trade practices.<sup>3</sup> The examples are presented chronologically with

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<sup>1</sup> The United Nations (UN) was founded after the Second World War to work towards international peace and security, to develop better diplomatic relations between nations, and to promote human rights, social progress, and better living conditions. For more information on the history and purposes of the UN see <https://www.un.org/un70/en/content/history/index.html> (date of use: 16 March 2020). The UN adopted general guidelines for consumer protection on 9 April 1985 see [https://www.un.org/esa/sustdev/publications/consumption\\_en.pdf](https://www.un.org/esa/sustdev/publications/consumption_en.pdf) (date of use: 11 February 2020); (UN Guidelines). See para 2.6 on the legal status of these Guidelines.

<sup>2</sup> For a detailed discussion of the freedom of contract principle, see Atiyah *Freedom of Contract*; Aronstam *Freedom of Contract*; Eiselen (1989) *THRHR* 519; Pretorius (2003) *THRHR* 640-641; Hawthorne (1995) *THRHR* 162-167.

<sup>3</sup> These attributes show similarities to ubuntu and South African constitutional values in the Bill of Rights.

no clear division between religious and secular texts, a division which was, in any event, foreign to early religious, ethical, and legal codes.

### 2.2.2 *Babylonian Code*

The codified laws of King Hammurabi of Babylon contain clauses which may be regarded as early written examples of consumer protection measures.<sup>4</sup> So, clause 229 provides that if a builder erects a house and it collapses on the owner, the builder shall be sentenced to death.<sup>5</sup> The Code also regulated the sale of liquor and fixed a fair price for beer;<sup>6</sup> the cost of shipbuilding was regulated and the shipbuilder was obliged to provide a one-year guarantee of the ship's seaworthiness;<sup>7</sup> loans and bonds were regulated, and a high interest rate was charged on overdue loans.<sup>8</sup>

This early dispensation already illustrates principles of justice and fairness and concomitant penalties for perpetrators of fraud.

### 2.2.3 *The Bible*

Most Old Testament proscriptions deal with health and other societal rules for the Israelites. However, various books in the Old Testament condemn false weights and measures – one of the earliest consumer protection problems. For example, Amos 8:4-6 provides:

‘Hear this, O ye that swallow up the needy, even to make the poor of the land fail, Saying, When will the new moon be gone, that we may sell corn and the Sabbath, that we may set forth wheat, making the ephah small,<sup>9</sup> and the shekel great,<sup>10</sup> and falsifying the balances by deceit? That we may buy the poor for silver, and the needy for a pair of shoes; yea, and sell the refuse of wheat?’<sup>11</sup>

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<sup>4</sup> Generally referred to as the Code of Hammurabi, the Code was written between 1792 and 1750 BC, see <https://www.britannica.com/topic/Code-of-Hammurabi> (date of use: 1 November 2018); Wood *Consumer Protection* 633.

<sup>5</sup> Wood *Consumer Protection* 634; Lord Buckmaster referred to this specific Babylonian law in *Donoghue v Stevenson* [1932] AC 562 577-578 (hereafter *Donoghue*).

<sup>6</sup> Clause 108 of the Code of Hammurabi available at <http://iws.collin.edu/mbailey/hammurabi's%20laws.htm> (date of use: 6 December 2018).

<sup>7</sup> Clause 235 Code of Hammurabi available at <http://iws.collin.edu/mbailey/hammurabi's%20laws.htm> (date of use: 6 December 2018).

<sup>8</sup> For a brief discussion on Babylonian loan agreements, see Schulze *LLD* 26-27.

<sup>9</sup> Hebrew measure used for dry produce, approximately a third of a bushel (35 litres) available at <https://www.dictionary.com/browse/ephah> (date of use: 26 September 2018).

<sup>10</sup> Babylonian unit of weight equal to about a quarter to half an ounce available at <https://www.dictionary.com/browse/shekel?s=t> (date of use: 26 September 2018).

<sup>11</sup> King James Version The Bible Amos 8:4-6 available at [www.christianity.com/bible/bible.php?q=Amos+8&ver=kjv](http://www.christianity.com/bible/bible.php?q=Amos+8&ver=kjv) (date of use: 24 August 2018). The book of Amos was written in approximately the 8<sup>th</sup> century BC, see <https://www.britannica.com/topic/Book-of-Amos> (date of use: 1 November 2018). Other similar texts are Leviticus 19:35-36; Deuteronomy 25:13-16; Ezekiel 45:9-10; Hosea 12:7-8; Micah 6:10-14; and Proverbs 10:10.

Similarly, Micah chapter 6:10-11 reads: 'Are there yet the treasures of wickedness in the house of the wicked, and the scant measure that is abominable? Shall I count them pure with the wicked balances, and with the bag of deceitful weights?'<sup>12</sup>

These and other examples deal with fairness – in particular the standardisation of measures used to sell wheat – and are aimed at preventing fraudulent behaviour by merchants resulting in the exploitation of the poor.

#### 2.2.4 Indian texts<sup>13</sup>

In ancient India, texts estimated to have been written between the eighth century BC and the second century AC,<sup>14</sup> deal with economic life by introducing codes and guidelines based on human rights, values, and fair-trade practices.<sup>15</sup> These codes are divided into *Dharmashastras*<sup>16</sup> that deal with the religious, moral, social, and legal duties of the individual; and the *Arthashastra*, that deals with the duties of the authorities or rulers to punish offenders.<sup>17</sup>

Among the matters regulated by these codes are debt, loans, and interest rates; strict control over services delivered to customers; control measures on weights, substitutions, and pilfering of precious materials; regulations on the washing of clothes for customers; and measures controlling weavers to prevent extra weighting of fabrics by soaking threads in rice gruel. Even medical practitioners were regulated – doctors had to inform authorities if a proposed medical procedure posed a risk to the life of a patient.<sup>18</sup>

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<sup>12</sup> See <https://www.biblegateway.com/passage/?search=Micah+6&version=KJV> (date of use: 20 September 2019).

<sup>13</sup> Although I do not formally compare the position in India in this study, I chose India for this historical background because of the interesting and comprehensive nature of these historical measures – and the fact that they illustrate a sophisticated system which even provided for competition law aspects that have a direct bearing on consumer protection measures.

<sup>14</sup> Such as the *Manu Smitri*, Laws of Manu available at <https://www.britannica.com/topic/Manu-smriti> (date of use: 24 January 2019); *Narada Smitri*, procedural and substantive law ascribed to Narada, a divine sage, see <https://www.sandiegoreader.com/news/2012/feb/16/excerpts-narada-smriti/#> (date of use: 24 January 2019); *Brihaspati Smitri* – the Smitris were Hindu religious texts in Sanskrit that contained traditional teachings on religion, the word literally means remembrance, see <https://en.oxforddictionaries.com/definition/smitri> (date of use: 24 October 2018); Prasad (2008) *JTCL* 133; and *Arthashastra*, a work attributed to Kautilya, mainly concerned with public law, competition law, tax and administration, see <https://www.britannica.com/topic/Artha-shastra> (date of use: 24 January 2019). The *Arthashastra* dealt with punishments by rulers or the state; Prasad (2008) *JTCL* 133.

<sup>15</sup> Goyal et al (2013) *JHV* 147; Prasad (2008) *JTCL* 133.

<sup>16</sup> Text mainly concerned with Hindu family law and legal administration, see <https://www.britannica.com/topic/Dharma-shastra> (date of use: 24 January 2019).

<sup>17</sup> Goyal et al (2013) *JHV* 148. For a detailed discussion of the link between consumer law and competition law – and a proposal that there should be a unified theory on competition and consumer protection law—see Lande & Averitt (1997) *Antitrust LJ* 713-756; Albors-Llorens (2014) *Yearbook of European Law* 163-193.

<sup>18</sup> Goyal et al (2013) *JHV* 151.



If services or goods were not performed or delivered in accordance with the agreement concerned, it was regarded as a breach of contract and the customer did not have to pay the purchase price. The fine or punishment for these offences was severe and the guilty party could be banished by the king and obliged to pay a fine as compensation to the customer.<sup>19</sup> Both the *Manu Smitri* and the *Narada Smitri* provided that a dissatisfied purchaser could return the item and was entitled to a refund of the purchase price according to prescribed tables and within periods prescribed for the return of the item.<sup>20</sup>

The purchase prices of all goods were fixed by guilds or the state, depending on their quality, origin, the time and expertise required to produce the item, how long the item had been stored, and the seller's outlay.<sup>21</sup> This emphasises the importance of fairness in trade and was aimed at the protection of consumers.<sup>22</sup> A head of commerce regulated monopolies, and unfair trade practices were prohibited, even state monopolies, like mines, minerals, and salt mines all of which belonged to the king, were checked by the superintendent of commerce.<sup>23</sup> Weights and measures were strictly regulated and inspected every six months.<sup>24</sup>

There were also laws regulating the consumer who was required to act responsibly and not purchase items at an unreasonably low price. He or she had to inspect the *res vendita* carefully, and after approving it could not return it. The period allowed for inspection and approval differed depending on the merchandise concerned – eg, five days for beasts of burden, while seven days were allowed for precious stones.<sup>25</sup> According to *Manu*, a consumer should only pay a deposit to a person of good standing,<sup>26</sup> which points to the level of care and responsibility required of consumers, and reflects a balanced approach which also protects suppliers and merchants.

Here, for the first time, we see more sophisticated consumer protection measures regulating not only merchants and suppliers, but also consumers, government officials, and even the king.<sup>27</sup>

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<sup>19</sup> Goyal et al (2013) *JHV* 152-153.

<sup>20</sup> Goyal et al (2013) *JHV* 154. These rules are similar to modern-day guarantees and warranties, 'appro', and cooling-off periods. See the discussion in Ch 3 para 3.2.13 and Ch 4 para 4.3.3.4.

<sup>21</sup> Goyal et al (2013) *JHV* 155; Prasad (2008) *JTCL* 133.

<sup>22</sup> Goyal et al (2013) *JHV* 155.

<sup>23</sup> Goyal et al (2013) *JHV* 155; Prasad (2008) *JTCL* 133.

<sup>24</sup> Goyal et al (2013) *JHV* 156; Prasad (2008) *JTCL* 133.

<sup>25</sup> Goyal et al (2013) *JHV* 156; Prasad (2008) *JTCL* 133. Similar to 'appro', see the discussion in Ch 3 para 3.2.13 and Ch 4 para 4.3.3.4.

<sup>26</sup> Goyal et al (2013) *JHV* 157. This shows similarities to the *caveat emptor* maxim.

<sup>27</sup> Consequently also providing for public competition-law aspects of the economy.

### 2.2.5 Quran<sup>28</sup>

Islamic law refers to and regulates the position of the consumer, and provides general principles to ensure honesty and protect consumers.<sup>29</sup> Numerous verses in the Quran record the obligation to act honestly and justly.<sup>30</sup> *Surah Mutaaffifin*<sup>31</sup> stipulates in Quran 83:1-3: 'Woe to the stinters;<sup>32</sup> those who, when they take from others by measure, take their full share; but who, when they measure or weigh for others, give less than their due.'<sup>33</sup>

These religious rules, based on honesty and fairness, show a remarkable similarity to those contained in other religious texts.

### 2.2.6 Roman law

Information on and sources of law in early Roman times are rare as the Gaelic Fire destroyed virtually all legal sources in approximately 387 BC.<sup>34</sup> While not much is known about early Roman history, in approximately 300 BC Rome was primarily an agrarian society with each household forming a community. The *paterfamilias*<sup>35</sup> stood at the head of the family, which included his wife, children, and slaves, all of whom were subject to his power and discretion.<sup>36</sup> Between the third and first centuries BC, the Romans extended their power and eventually controlled a large part of the ancient world, including Asia Minor,<sup>37</sup> Egypt, and other areas of North Africa, the Southern and Western parts of Europe, and the Near East. As a result, societies changed from a rural to an urban lifestyle, which, in turn, resulted in the development of commerce, industry, and finance, and a more sophisticated legal system.

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<sup>28</sup> Written between 609 and 632 AD see <https://www.quora.com/According-to-Islam-when-was-the-first-Quran-written> (date of use: 1 November 2018).

<sup>29</sup> Khan (2011) *Islamabad LR* 87; Bakar & Amin (2011) *IJSPS* 37-38; Islamic law is also known as Shari'ah.

<sup>30</sup> Only a few examples are provided – *Surah Al-Humazah* 104:1-4; *Surah Al-Rahman* 55:9 and *Surah Al-Baqarah* 2:190.

<sup>31</sup> *Surah* is a chapter in the Quran, see <https://www.britannica.com/topic/surah> (date of use: 24 January 2019) and *Mutaaffifin* is derived from *tatfif* which means inferior – generally used in the sense of indicating a short weight or measure that is provided fraudulently. See <http://www.islamicstudies.info/tafheem.php?sura=83> (date of use: 24 January 2019).

<sup>32</sup> This means fraudsters, see <https://www.islamicstudies.info/tafheem.php?sura=83> (date of use: 21 September 2019).

<sup>33</sup> See <https://www.islamicstudies.info/tafheem.php?sura=83> (date of use: 21 September 2019).

<sup>34</sup> Van Zyl *Geskiedenis* 21.

<sup>35</sup> 'Head of the family' see Hiemstra & Gonin *Drietalige Regswoordeboek* 253; Van Zyl *Geskiedenis* 7.

<sup>36</sup> The Twelve Tables developed through interpretation and formed the basis of statutory law during this period. See Kaser *Roman Law* 3; Van Zyl *Geskiedenis* 4.

<sup>37</sup> Anatolia, today a part of Turkey, see <https://www.britannica.com/place/Anatolia> (date of use: 6 November 2018).

The Romans were influenced greatly by Greek culture, and this was an important factor in the development of a more sophisticated, ordered legal system.<sup>38</sup> The Roman legal system reached its pinnacle during the Principate,<sup>39</sup> with jurists of the time described as creative, precise, and subtle in their application and analysis of the law.<sup>40</sup>

Although the concept of contractual freedom was unknown at that time, contracts were freely negotiated in Roman law because of the flexibility of the *stipulatio*.<sup>41</sup> It follows, therefore, that a considerable degree of freedom already existed in practice in Roman law, although this freedom was limited by formalities.<sup>42</sup> However, freedom of contract as a formally accepted principle of law only emerged during the Middle Ages<sup>43</sup> with the development of the maxim *pacta servanda sunt*.<sup>44</sup>

Roman law knew several measures for the protection of purchasers – a seller was obliged to protect the purchaser against the risk of damage to or loss of the *res vendita* before delivery;<sup>45</sup> he or she had to deliver the *res vendita* to the purchaser;<sup>46</sup> provide vacant possession of the *res vendita*; and indemnify the purchaser against both excussion,<sup>47</sup> and latent defects.<sup>48</sup>

The decline of the Roman Empire<sup>49</sup> led to the decline of the legal system and eventually, to the disappearance of the classical way of thinking, resulting in the development of so-called vulgar law during the Middle Ages.<sup>50</sup>

The outstanding characteristic of the Roman law heritage is that it is sophisticated, fair, and based on justice for all. While it was the first purely legal system to develop, it has retained value, and Roman law is still highly regarded and applied today.<sup>51</sup>

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<sup>38</sup> Based on analysis and synthesis.

<sup>39</sup> 27 BC – 284 AD; Van Zyl *Geskiedenis* 4-5.

<sup>40</sup> Kaser *Roman Law* 4; Van Zyl *Geskiedenis* 5. Roman jurisprudence always tended to be practical and less theoretical. See Kaser *Roman Law* 5.

<sup>41</sup> Eiselen (1989) *THRHR* 519. The *stipulatio* developed from a verbal agreement that was an important legal action in Roman law. It was a one-sided contract based on a promise or pledge, and only one right and one obligation were created by the *stipulatio*. See Van Zyl *Geskiedenis* 281-283.

<sup>42</sup> Eiselen (1989) *THRHR* 519-520.

<sup>43</sup> Roughly between 500 AD and approximately 1400. See <https://www.britannica.com/event/Middle-Ages> (date of use: 16 March 2020).

<sup>44</sup> Eiselen (1989) *THRHR* 520.

<sup>45</sup> Van Zyl *Geskiedenis* 290-291.

<sup>46</sup> Van Zyl *Geskiedenis* 291-292; Kaser *Roman Law* 214.

<sup>47</sup> Van Zyl *Geskiedenis* 293; Kaser *Roman Law* 215.

<sup>48</sup> Van Zyl *Geskiedenis* 294-295; Kaser *Roman Law* 217-218.

<sup>49</sup> 307-337 AC Kaser *Roman Law* 5.

<sup>50</sup> Vulgar law can be described as the law of laymen. See Kaser *Roman Law* 5.

<sup>51</sup> See, eg, the recent decision *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd and Another* 2016 (1) SA 621 (CC) para [1] (hereafter *Mighty Solutions*).

For purposes of this study, the importance of Roman law is that our common-law of contract is based on Roman law principles to which our courts frequently refer.<sup>52</sup>

Both religious and legal systems had similar rules aimed at the just and fair treatment of consumers and merchants alike, and at providing the parties with remedies in cases of breach. These measures further aimed at preventing fraudulent and unconscionable behaviour by merchants, and the exploitation of the poor. The characteristic of these early consumer protection measures is the standardisation of weights and measures for basic commodities like wheat and ale.

### 2.3 History from the Middle Ages onwards

#### 2.3.1 England

In England, measures controlling uniform weight date back to the first version of the *Magna Carta Libertatum*,<sup>53</sup> commonly known as the *Magna Carta*, a document initially drafted by the Archbishop of Canterbury and first agreed to by King John of England on 15 June 1215. Lord Denning regarded the *Magna Carta* as ‘...the greatest constitutional document of all times – the foundation of the freedom of the individual against the arbitrary authority of the despot’.<sup>54</sup> Clause 35 of the Charter contains consumer protection measures:<sup>55</sup>

‘There shall be standard measures of wine, ale, and corn (the London quarter),<sup>56</sup> throughout the kingdom. There shall also be a standard width of dyed cloth, russett, and haberject,<sup>57</sup> namely two ells within the selvedges.<sup>58</sup> Weights are to be standardised similarly.’<sup>59</sup>

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<sup>52</sup> *Baines Motors v Piek* 1955 (1) SA 534 (A), 540-547 (*Baines*); *Mighty Solutions* 629.

<sup>53</sup> The Great Charter of the Liberties, commonly referred to as the *Magna Carta* available at <https://www.britannica.com/topic/Magna-Carta> (date of use: 24 January 2019).

<sup>54</sup> Lord Dyson available at <https://www.judiciary.uk/wp-content/uploads/2014/06/mor-speech-magna-carta-religion1.pdf> (date of use: 22 September 2019).

<sup>55</sup> The clauses in the original document were not numbered, this was done in 1759 by Sir William Blackstone, see Prest (2016) *NCLR* 1495.

<sup>56</sup> For a discussion of the standardisation of measures see [https://magnacarta.cmp.uea.ac.uk/read/magna\\_carta\\_1215/Clause\\_35](https://magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/Clause_35) (date of use: 8 June 2020).

<sup>57</sup> Russett was a reddish-brown fabric worn mainly by the poor, and haberject was a cloth of mixed colour often worn by monks. See <https://thehistoryofengland.co.uk/resource/magna-carta-the-great-charter-of-liberties-of-king-john-1215/> (date of use: 2 November 2018).

<sup>58</sup> A selvedge is the edge of fabric, woven to prevent raveling. See <https://www.dictionary.com/browse/selvedge> (date of use: 12 December 2018).

<sup>59</sup> English translation available at <https://www.law.gmu.edu/assets/files/academics/founders/MagnaCarta.pdf> (date of use: 12 December 2018). The original Clause 35 reads: ‘*Una mensura vini sit per totum regnum nostrum, et una mensura cervisie, et una mensura bladi, scilicet quarterium Londoniense, et una latitudo pannorum tinctorum et russetorum et halbergettorum, scilicet due ulne infra listas; de ponderibus autem sit ut de mensuris*’, see <http://www.thelatinlibrary.com/magnacarta.html> (date of use: 12

Clause 45 deals with the enforcement of law and court officials: 'We will appoint as justices, constables, sheriffs, or other officials, only men that know the law of the realm and are minded to keep it well.'<sup>60</sup> Both of these clauses accentuate the importance and need for preventative measures against the exploitation of defenceless consumers.

The principle (*pacta servanda sunt*) originated from the medieval canonists who adopted Roman law concepts to serve their own purposes. A pact could extinguish an obligation, but was not a cause of action. Grotius was instrumental in establishing the principle in Roman-Dutch law and he regarded the maxim as the basis of positive law.<sup>61</sup>

In the pre-industrial period consumers had little choice of product. There were also virtually no measures to prevent the exploitation of consumers who were expected to fend for themselves in line with the maxim *caveat emptor*.<sup>62</sup> The relationship between seller and consumer was much more personal than in the industrial period, and if a seller failed to deliver good service, or was dishonest, he or she would more than likely struggle to find customers.<sup>63</sup> There were basic laws regulating the pricing, weight, and quality of bread, and the measure of ale – eg, the Assize of Bread and Ale dating from 1226.<sup>64</sup> Leet courts which sought to protect consumers developed in England during the seventeenth century.<sup>65</sup> The purpose of these courts was to

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December 2018). Clause 45: '*Nos non faciemus justiciarios, constabularios, vicecomites, vel ballivos, nisi de talibus qui sciunt legem regni et eam bene velint observare*'. Available at <http://www.thelatinlibrary.com/magnacarta.html> (date of use: 12 December 2018).

<sup>60</sup> English translation available at

[www.law.gmu.edu/assets/files/academics/founders/MagnaCarta.pdf](http://www.law.gmu.edu/assets/files/academics/founders/MagnaCarta.pdf) (date of use: 12 December 2018). Clause 45: '*Nos non faciemus justiciarios, constabularios, vicecomites, vel ballivos, nisi de talibus qui sciunt legem regni et eam bene velint observare*'. Available at <http://www.thelatinlibrary.com/magnacarta.html> (date of use: 12 December 2018).

<sup>61</sup> See Eiselen (1989) *THRHR* 521. For an analysis of the history and development of this principle see Visser (1984) *SALJ* 641-655. Visser explains that this principle originated from Roman law and related to *pacta* or pacts, a term originally used in the sense of an agreement to redeem an obligation for liability in respect of a personal injury. Also see Visser (1984) *SALJ* 649-651; Eiselen (1989) *THRHR* 521-522. Grotius (De Groot) accepted limitations on the principle, amongst others in respect of employment agreements and usurious profits. See Eiselen (1989) *THRHR* 522; De Groot 3 19 6; 3 19 13 *De iure belli ac pacis*; Eiselen (1989) *THRHR* 530; De Groot 3 10 9; 3 10 10; *De iure belli ac pacis* 2 12 20.

<sup>62</sup> For a discussion of the development of the maxim *caveat emptor* see Hamilton 1133-1187 <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=3488&context=ylij> (date of use: 19 September 2019).

<sup>63</sup> Khan (2017) *JAASSH* 40.

<sup>64</sup> Later measures were the Weight and Measures Act of 1795 and the Bread Act of 1836. See Khan (2017) *JAASSH* 41; see also <https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1468-0289.1956.tb00665.x> (date of use: 6 April 2019).

<sup>65</sup> Khan (2017) *JAASSH* 40. These courts were criminal courts for petty offences, see <https://www.britannica.com/topic/court-leet> (date of use: 9 October 2018).

regulate trading standards and proper measures, amongst others for the pricing and measuring of ale and bread.<sup>66</sup>

The Industrial Revolution<sup>67</sup> brought radical change. When machine manufacture developed, society changed from agrarian to urban as people moved from rural areas to cities to work in factories. The trade sector became less personal, and consumers did not necessarily know who manufactured their goods. A large variety of products became available and the different producers or manufacturers competed fiercely for business. As a result, the quality of goods improved and producers became more competitive.<sup>68</sup>

As society became more industrialised during the nineteenth century, it developed from a subsistence population to a mass consumer society.<sup>69</sup> This led to circumstances where consumers did not know producers personally, and could therefore easily be misled, as the theory of individualism and the maxim *caveat emptor* prevailed.<sup>70</sup>

The 1892 judgment in *Carlill v Carbolic Smoke Ball Company*<sup>71</sup> marked a definite move towards improved protection for consumers. In this case the sellers, manufacturers of a medicine called the Carbolic Smoke Ball, claimed in newspaper advertisements they would pay £100 to anyone who contracted influenza after having used their Carbolic Smoke Ball as directed. The purchaser, a Mrs Carlill, used the Smoke Ball as directed but still contracted flu. The sellers argued that the advertisement was not an agreement with any specific person. The court found that in such a case there was no need to inform the seller of acceptance of the offer, as mere performance of the required conditions amounted to acceptance of the offer as advertised,<sup>72</sup> and it accordingly found in favour of Mrs Carlill.<sup>73</sup>

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<sup>66</sup> Khan (2017) JAASSH 40-41; see also <https://www.britannica.com/topic/court-leet> (date of use: 6 April 2019).

<sup>67</sup> The Industrial Revolution took place between approximately 1760 and 1840, and refers to technological, socio-economic and cultural change when the agrarian and handicraft-based economy evolved into an economy in which industry and machine-manufactured goods predominated. See <https://www.britannica.com/event/Industrial-Revolution> (date of use: 16 March 2020).

<sup>68</sup> Khan (2017) JAASSH 40.

<sup>69</sup> Also referred to as the Industrial Society, see Khan (2017) JAASSH 40; Atiyah *Freedom of Contract* 572-574.

<sup>70</sup> In the decision *Parkinson v Lee* 102 Eng Rep 389 (hereafter *Parkinson*) in 1802, the King's Bench still denied the implied warranty of goods sold. The purchaser bought five packets of hops seeds from the seller. When the purchaser received the hops, it soon became evident that the product he received had been treated with water to increase its weight. At the time of the purchase it was impossible for the purchaser to establish that the product was worthless. Although the jury found in favour of the purchaser, the court denied the existence of an implied warranty and granted absolution from the instance (391-393). See Khan (2017) JAASSH 40; Hawthorne (1995) *THRHR* 164.

<sup>71</sup> [1893] 1 QB 256 (1892) (hereafter *Carbolic Smoke*); Atiyah *Freedom of Contract* 576.

<sup>72</sup> *Carbolic Smoke* 262-263.

<sup>73</sup> *Carbolic Smoke* 269-270.

Initially, there was no government intervention to protect consumers, but the many cases concerning the law of purchase and sale during the period resulted in the Sale of Goods Act 1893, which codified the common law on purchase and sale.<sup>74</sup> Despite this, consumers still did not have a right to safe products or services.

The twentieth century saw major developments in British consumer law with the emergence of large retail shops, large-scale advertising, and greater availability of credit to consumers.<sup>75</sup> The adjudication of consumer protection-related cases, too, saw important movement, notably in the 1932 Scottish case of *Donoghue v Stevenson*.<sup>76</sup> In this case, Ms Donoghue bought a sealed, opaque, dark glass bottle of ginger beer. Having drunk the ginger beer, she discovered a decomposed snail in the bottle. It had been impossible to see the snail while drinking the ginger beer. Donoghue claimed to have suffered shock and a serious case of gastro-enteritis as a result and claimed damages from the manufacturer. She based her claim on the manufacturer's negligence as she claimed it had a duty to ensure that there were no harmful substances or ingredients in its product. The court found that a manufacturer owes the consumer a duty of reasonable care to ensure that a product that cannot be inspected by the consumer is not harmful to his or her health.<sup>77</sup> The majority of the court ruled that a manufacturer has a legal duty to take reasonable care to ensure the product is not harmful or causes injury.<sup>78</sup>

### 2.3.2 *United States*<sup>79</sup>

In the United States of America (USA), courts also recognised a responsibility on the part of manufacturers towards consumers in the 1916 case of *MacPherson v Buick Motor Company*.<sup>80</sup> The court held a manufacturer responsible for testing its products to verify their safety.<sup>81</sup> It further held that a manufacturer is obliged to inspect the *merx*, and that this obligation varies according to the nature and use of the *merx*.<sup>82</sup>

### 2.3.3 *Concluding remarks: History of consumer protection*

Technological advances, mass production, the increase in the number of products and services available to consumers, and the increased remoteness of transactions, made consumers increasingly vulnerable to problems related to quality, safety, and in seeking remedies. Internationally this led to a move towards consumer activism and the awareness of governments of their need to protect consumers. It became

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<sup>74</sup> Khan (2017) JAASSH 41-42.

<sup>75</sup> Atiyah *Freedom of Contract* 573-577.

<sup>76</sup> [1932] AC 562 (hereafter *Donoghue*).

<sup>77</sup> *Donoghue* 564.

<sup>78</sup> *Donoghue* 562, 599, 604, and 620.

<sup>79</sup> I specifically mention the United States of America (USA) here because it was a leader in developing consumer protection measures.

<sup>80</sup> 217 NY 382 (hereafter *Buick*).

<sup>81</sup> *Buick* 394.

<sup>82</sup> *Buick* 395.

clear that, despite consumers' duty to inform themselves and make rational decisions before entering into agreements, they were in need of protection in the form of consumer organisations and consumer legislation to improve and promote fairness and protection and prevent exploitation.<sup>83</sup>

### 2.4 Legal philosophy on freedom to contract and consumer protection

#### 2.4.1 Introduction

Legal philosophy plays an important role in the interpretation, application, and adjudication of contracts, as well as in the process, thought, and reasons for the drafting of legislation and the specific method, approach, and wording of such legislation.<sup>84</sup> Legal philosophy is a living, ever-changing theory that morphs with the changes in society and its values, its beliefs, its changing technologies and politics, changing ethical and moral values, and changing socio-economic circumstances. The purpose of legal theory is to describe, form, and protect the standards, moral values, ethics, and integrity of society.<sup>85</sup> There are three main branches of legal philosophy:<sup>86</sup>

- Descriptive jurisprudence which analyses the law, legal concepts, and ideas and does not depend on any single theory or principle.<sup>87</sup>
- Normative jurisprudence which seeks to find the purpose of law – it studies values, politics, and morals to establish the foundation of law. It further seeks to find the ideal. This branch of jurisprudence focuses on criticism and reform.<sup>88</sup>
- Critical legal theory which acknowledges that the law is intertwined with social issues and questions the notion that law is based on reason.<sup>89</sup>

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<sup>83</sup> Khan (2017) *JAASSH* 43; Eiselen (1989) *THRHR* 533, 539; Hawthorne (1995) *THRHR* 166; Stoop *LLD* 20-23. As an aside, the secondary purpose of some of the early regulatory measures, in India for instance, was to regulate prices, monopolies, and even the king. In other words, these regulations fell within the public competition law sphere, and although they protected consumers indirectly, the measures were not primarily enacted to protect consumers. This principle still rings true today. For more information on the interaction between these two areas of the law see Lande & Averitt (1997) *Antitrust LJ* 713-756.

<sup>84</sup> This study is not a philosophical study, but a brief background is necessary for an understanding of the development of consumer protection. A complete philosophical study and analysis cannot be undertaken, as that would justify a thesis on its own. Also see Atiyah *Freedom of Contract* 685-708; Wacks *Understanding Jurisprudence* 1.

<sup>85</sup> Wacks *Understanding Jurisprudence* 13.

<sup>86</sup> This is based on Wacks's exposition in *Understanding Jurisprudence* 6-7.

<sup>87</sup> See <https://thelawdictionary.org/analytical-jurisprudence/> (date of use: 24 October 2018).

<sup>88</sup> Wacks *Understanding Jurisprudence* 7; and see [http://assets.cambridge.org/97805214/60002/frontmatter/9780521460002\\_frontmatter.pdf](http://assets.cambridge.org/97805214/60002/frontmatter/9780521460002_frontmatter.pdf) (date of use: 24 October 2018).

<sup>89</sup> See [https://www.law.cornell.edu/wex/critical\\_legal\\_theory](https://www.law.cornell.edu/wex/critical_legal_theory) (date of use: 24 October 2018); Wacks *Understanding Jurisprudence* 7.



As background to this study, it suffices to mention two main schools of thought in legal philosophy – legal positivism, and natural law.<sup>90</sup>

Historically, scholars and philosophers have agreed that the ideal circumstances in matters of trade were for an individual to have the freedom to exercise his or her rights without interference, and that he or she could negotiate the terms and conditions of any agreement precisely as he or she wished. Further, the terms negotiated would be adhered to and enforced strictly.<sup>91</sup> The basis of this idealistic theory, which declared that all parties are equal,<sup>92</sup> is believed to lie in the philosophy of the libertarian philosophers of the sixteenth and seventeenth centuries.<sup>93</sup>

### 2.4.2 *The movement from individualism to collectivism*

The freedom to contract is generally thought to consist of four facets: the freedom to contract without interference from government or impositions by government; the freedom to contract with whomever one wishes; the freedom to decide not to enter into an agreement; and finally, the freedom not to have the concluded agreement tampered or interfered with in any way.<sup>94</sup> Eiselen adds a fifth dimension, the principle that no formal requirements are needed and that mere consensus between contracting parties is sufficient to establish a contract. I agree with this view in both theory and principle, but experience has shown that in practice this fifth dimension is idealistic and does not sufficiently address practical problems – eg, parties failing to remember intricate details or dates of an agreement after a few months, and difficulty in proving certain conditions in court when an oral agreement is disputed.<sup>95</sup>

Freedom of contract is based on the individualist theory which turns on the idea that the individual is of vital moral importance, should be autonomous, and has inviolable rights.<sup>96</sup> In addition, the theory is based on the equality of the parties, and does not acknowledge the possibility of the abuse and exploitation of a vulnerable party.<sup>97</sup>

Grotius argued that the right to contract was a basic human right related to the freedom of choice.<sup>98</sup> In England, similar views were held by Locke who advocated perfect freedom. He developed his theory around the idea that liberty could be

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<sup>90</sup> 'Legal positivism is the thesis that the existence and content of law depends on social facts and not on its merits.' Green L <https://plato.stanford.edu/entries/legalpositivism/> (date of use: 24 January 2019). Natural law links morals (what ought to be) to law, see Wacks *A Philosophy* 1-2.

<sup>91</sup> Aronstam *Freedom of Contract* 1-16; Eiselen (1989) *THRHR* 516, 521-522; Pretorius (2003) *THRHR* 640.

<sup>92</sup> Aronstam *Freedom of Contract* 3; Eiselen (1989) *THRHR* 525; Pretorius (2003) *THRHR* 640.

<sup>93</sup> Aronstam *Freedom of Contract* 1; Eiselen (1989) *THRHR* 524.

<sup>94</sup> Khan *Contract & Mercantile Law* 32-33; Aronstam *Freedom of Contract* 13-14; Eiselen (1989) *THRHR* 518. Also see Pretorius 2003 *THRHR* 640.

<sup>95</sup> See Eiselen (1989) *THRHR* 516, 518.

<sup>96</sup> Wacks *Understanding Jurisprudence* 364; Atiyah *Freedom of Contract* 256–263; Pretorius (2003) *THRHR* 639-640.

<sup>97</sup> Hawthorne (1995) *THRHR* 157, 176; Hawthorne (2006) *THRHR* 53-56; Eiselen (1989) *THRHR* 538-539.

<sup>98</sup> Grotius was a stalwart of the natural-law philosophy. See Aronstam *Freedom of Contract* 1.

stated or expressed in terms of fundamental rights.<sup>99</sup> Mill<sup>100</sup> subsequently contended that there should be minimum interference by government in the affairs of society, as this would be an impediment to basic freedom and freedom of contract.<sup>101</sup> He supported the utilitarian philosophy that man is free to do as he or she wishes provided that it does not harm others.<sup>102</sup> Other philosophers also subscribed to the idea that legislation should not interfere with the freedom of contract, and that this freedom is important for trade and industry.<sup>103</sup> Adam Smith, for instance, played a major role in the *laissez-faire*<sup>104</sup> economic era of the nineteenth century.<sup>105</sup> Kessler argues that freedom of contract is not only of moral or philosophical importance, but that it has value as a practical principle, thus contract law bears and should bear characteristics of individualism and of the freedom to contract as one pleases – *laissez-faire*.<sup>106</sup> ‘Contract, the language of the cases tells us, is a private affair and not a social institution.’<sup>107</sup> Freedom of contract forms the basis for the principle that parties have the widest possible freedom to contract, that courts cannot and will not contract on behalf of parties, that courts will only interpret the terms that parties have agreed upon, and that a contract will be enforced by courts.<sup>108</sup>

These legal philosophers all believed in minimum state interference, and individualism is key to all their theories.

*Laissez-faire* embraces the idea that individuals should act in their own interest with no interference from government.<sup>109</sup> This, ideally, would lead to gain in profits and ultimately, to a wealthy society. Therefore, parties were deemed to have entered

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<sup>99</sup> Aronstam *Freedom of Contract* 3; Atiyah *Freedom of Contract* 292-323. It is not possible to even scratch the surface of all the important and relevant philosophers who played a role. See Atiyah *Freedom of Contract* 292-323. Only a few are mentioned very briefly.

<sup>100</sup> John Stuart Mill.

<sup>101</sup> Aronstam *Freedom of Contract* 4. Freedom of contract is the freedom to enter into agreements without government restrictions. See <https://www.merriam-webster.com/legal/freedom%20of%20contract> (date of use: 16 March 2020). Freedom of contract implies that a party to a contract can choose with whom to contract, whether to contract or not, and also on what terms to contract.

<sup>102</sup> Aronstam *Freedom of Contract* 4.

<sup>103</sup> Aronstam *Freedom of Contract* 4-5.

<sup>104</sup> *Laissez-faire* literally means ‘allow to do’. See <https://www.merriam-webster.com/dictionary/laissez-faire> (date of use: 28 January 2019). Figuratively, it is interpreted as a philosophy that advocates abstention from interference in individual freedom of choice and action.

<sup>105</sup> Aronstam *Freedom of Contract* 4-5; Eiselen (1989) *THRHR* 526, 528. Also see Atiyah *Freedom of Contract* for a detailed discussion and numerous references to Adam Smith, especially 221, 299, and 304.

<sup>106</sup> Kessler (1943) *Colum L Rev* 630.

<sup>107</sup> Kessler (1943) *Colum L Rev* 630. This principle has since changed from individually negotiated contracts to standard-form contracts, see Slawson (1984) *U Pitt L Rev* 23-28; Barnes (2007) *WLR* 228-230.

<sup>108</sup> Kessler (1943) *Colum L Rev* 630-631; *Printing and Numerical Registering Co v Sampson* LR 19 Eq 462, 465 (1875). Also see Kessler & Fine (1964) *HLR* 409-412.

<sup>109</sup> See <https://dictionary.cambridge.org/dictionary/english/laissez-faire> (date of use: 24 January 2019).

into agreements of their own will and courts upheld these contracts on this basis.<sup>110</sup> This libertarian philosophy also had an important impact on court decisions, both in South Africa and elsewhere. Jessel MR observed in *Printing and Numerical Registries Co v Sampson*<sup>111</sup> that people should have freedom to contract and that contracts entered into freely should be binding and enforced by courts. He held that public policy should not lightly interfere with voluntary and free contracts.<sup>112</sup> This enforcement of contracts entered into freely is known as the principle *pacta servanda sunt*, and is important from the perspective of this study.<sup>113</sup>

In South Africa, relying on the judgment by Jessel MR in the *Printing* case, the freedom of contract principle was set out in *Wells v South African Alumenite Co*.<sup>114</sup> Innes J stated that even if conditions in an agreement are onerous and strict,<sup>115</sup> parties should be held bound by those conditions if the contract was entered into freely and in the absence of fraud.<sup>116</sup>

This idealistic approach to freedom of contract more often than not led to the exploitation of consumers – but this was realised only in the early twentieth century.<sup>117</sup> Almost immediately, there was criticism of the strict application of the freedom of contract principle. Pound, for example, was critical of certain of the USA courts' approach to freedom of contract. As early as 1909 he pointed out that common law does not recognise freedom of contract in the form stated by courts in

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<sup>110</sup> The principle *pacta servanda sunt*. See Visser (1984) SALJ 641-655; Eiselen (1989) THRHR 527.

<sup>111</sup> (1875) LR 19 Eq 462 (hereafter *Printing*).

<sup>112</sup> *Printing* 465.

<sup>113</sup> This principle is relevant in respect of common-law agreements, standard-form contracts, and contracts under s 14 of the CPA because it is crucial in governing the relationship between contractual parties as regards fairness, justice, constitutional principles, and ubuntu. For a detailed background analysis of this maxim see Visser (1984) SALJ 641-655; Eiselen (1989) THRHR 520-523.

<sup>114</sup> 1927 AD 69 (hereafter *Alumenite*).

<sup>115</sup> This principle (*pacta servanda sunt*) originated from the medieval canonists who adopted Roman law concepts to serve their own purposes. See Eiselen (1989) THRHR 521. For an analysis of the history and development of this principle see Visser (1984) SALJ 641-655. Visser explains that this principle originated from Roman law and related to *pacta* or pacts, a term originally used in the sense of an agreement to redeem an obligation for liability in respect of a personal injury. A pact could extinguish an obligation, but was not a cause of action. Grotius was instrumental in establishing the principle in Roman-Dutch law and he regarded the maxim as the basis of positive law. See Visser (1984) SALJ 649-651; Eiselen (1989) THRHR 521-522. Grotius (De Groot) accepted limitations on the principle, amongst others in respect of employment agreements and usurious profits. See Eiselen (1989) THRHR 522; De Groot 3 19 6; 3 19 13 *De iure belli ac pacis*; Eiselen (1989) THRHR 530; De Groot 3 10 9; 3 10 10; *De iure belli ac pacis* 2 12 20.

<sup>116</sup> *Alumenite* para [73]. Aronstam criticises this harsh point of view by courts in *Freedom of Contract* 182-184.

<sup>117</sup> Aronstam *Freedom of Contract* 9. Also see Pound (1909) YLJ 454-487 for a full critique.

certain states.<sup>118</sup> His view on the role of the courts is summarised in the following citations:

'It has been said that the common law will not help a fool. But, equity exists to help and protect him. It is because there are fools to be defrauded and imposed upon, and unfortunates to meet with accidents and careless to make mistakes, that we have courts of equity.'<sup>119</sup>

And, on the very strict application of freedom of contract:

'The attitude of many of our courts on the subject of liberty of contract is so certain to be misapprehended, is so out of the range of the ordinary understanding, the decisions themselves are so academic and so artificial in their reasoning.(!) that they cannot fail to engender such feeling. Thus, those decisions do an injury beyond the failure of a few acts. These acts can be replaced as legislatures learn how to comply with the letter of the decisions and to evade the spirit of them. But the lost respect for our courts and law cannot be replaced. The evil of those cases will live after them in impaired authority of the courts long after the decisions themselves are forgotten.'<sup>120</sup>

Atiyah regards the classical theory of contract as a failure.<sup>121</sup> He ascribes this to its potential effect on third parties, the fact that the theory does not address competition-related aspects, the ignorance of consumers, and that the law appears to be more concerned with the actions of parties than with the contents of the original agreements.<sup>122</sup> From this, it is submitted that the theory was not sufficiently flexible or practical to keep up with real life challenges, sociological circumstances, the changing economic environment, fast developing technology, and international trends in consumer protection. In addition, Atiyah also observed a general deterioration in free choice and in the significance of consent as a contractual factor.<sup>123</sup> At this point, it is important to reiterate that freedom of contract has never been absolute – there have always been limits in all legal systems, especially where general interest dictated otherwise.<sup>124</sup> Many factors can influence freedom of contract: factual, economic, and legal – eg, monopolies and unequal bargaining positions. In South Africa, Eiselen recommends that factors such as legislative

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<sup>118</sup> Pound (1909) YLJ 482-483, 487. He based this criticism mainly on the decision in *Godcharles v Wigeman* 113 Pa St 431.

<sup>119</sup> Pound (1909) YLJ 483.

<sup>120</sup> Pound (1909) YLJ 487. Aronstam *Freedom of Contract* 211 agrees with this principle and suggests that courts in South Africa should also exercise their discretion to advance equity when dealing with the doctrine of freedom of contract.

<sup>121</sup> Atiyah *Freedom of Contract* 693-715. For a critique of Atiyah see Mensch (1981) *SLR* 753-772, especially 767-769.

<sup>122</sup> Atiyah *Freedom of Contract* 693-715.

<sup>123</sup> Atiyah *Freedom of Contract* 727-734.

<sup>124</sup> Khan *Contract and Mercantile Law vol 1* 31. Examples of this principle include legislation to regulate basic working conditions, minimum wages, interest rates, and other Acts in the public interest. The Constitution is also relevant, eg, ss 13, 23, 36-39.

limitations, monopolies, and differences in bargaining position be taken into account when investigating the influence and scope of contractual freedom.<sup>125</sup>

Collins regards contracts as a way of distributing wealth.<sup>126</sup> He contends that contract is based on justice on two levels. First, contract should effect justice in exchange where parties contract to acquire services or goods; and second, it should effect justice in the social market.<sup>127</sup> Hawthorne regards Collins's view of contracts as ideally suited for the 21<sup>st</sup> century. For Hawthorne the classical theory of contract is a perpetuation of colonial exploitation.<sup>128</sup> While she welcomes consumer protection in the form of legislation, she regards the retention of the freedom of contract principle in the common law as a 'schizophrenic' situation.<sup>129</sup> She proposes a co-operative theory for South African contract law to ensure justice and keep abreast with international developments.<sup>130</sup>

Collectivism gained support as a solution to the deficiencies, shortcomings, and criticisms of the philosophy of freedom to contract.<sup>131</sup> As a theory, collectivism opposes individualism and attempts to address the shortcomings identified by the individualist approach, by valuing the greater good of society as a collective above that of the individual.<sup>132</sup> This theory has gained support internationally and has led to the introduction of, amongst others, consumer protection measures.<sup>133</sup> This philosophy aligns with South Africa's constitutional democracy, public interest, and ubuntu.<sup>134</sup>

#### 2.4.3 Concluding remarks: Legal philosophy of freedom of contract

The individualist theory waned in the face of technological advances, mass production, the increase in the number of products and services available to consumers, and the increased remoteness of transactions. Consumers became more vulnerable to quality and safety issues, and were in need of protection, suitable remedies, and assistance when they had been exploited.

The application and interpretation of the principle of freedom of contract was deemed unfair to vulnerable consumers because of the strict interpretation of freedom of contract by the courts, the rigid application of *pacta servanda sunt*, and the potential detriment to vulnerable consumers. This led to a move towards collectivism<sup>135</sup> and resulted in, amongst others, consumer protection measures. As

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<sup>125</sup> Eiselen (1989) *THRHR* 519.

<sup>126</sup> Collins *Law of Contract* 10-11; Hawthorne (2006) *THRHR* 56.

<sup>127</sup> Collins *Law of Contract* 10-14.

<sup>128</sup> Hawthorne (2006) *THRHR* 49, 59 and 62.

<sup>129</sup> Hawthorne (2006) *THRHR* 63.

<sup>130</sup> Hawthorne (2006) *THRHR* 63.

<sup>131</sup> Pretorius (2003) *THRHR* 645; Barnes (2007) *WLR* 235.

<sup>132</sup> Cockrell (1992) *SALJ* 40, 42; Stoop *LLD* 28-29; Pretorius (2003) *THRHR* 639-642, 644-645.

<sup>133</sup> Stoop *LLD* 29.

<sup>134</sup> Du Plessis *LLD* 389-391.

<sup>135</sup> Pretorius (2003) *THRHR* 638-645.

a result, legislatures internationally intervened with measures to protect consumers,<sup>136</sup> because, despite consumers' duty to become informed and make rational decisions on their own before entering into agreements, they needed additional protection in the form of consumer protection legislation to improve and promote fairness and protection.<sup>137</sup>

Before I discuss these international legislative measures, I briefly consider the history and general characteristics of standard-form contracts – the agreement most commonly encountered in commerce, particularly when dealing with fixed-term contracts.

## 2.5 *Standard-form contracts*

### 2.5.1 *Introduction*

With the development of commerce and industry coupled with mass-production, came the need for standardised mass contracts which would save time and money and promote efficiency.<sup>138</sup> The idealistic *laissez-faire* theory was relatively successful when contracts were negotiated individually. However, once most goods were mass produced and profit margins dropped, it became imperative for suppliers to operate efficiently and speedily, and the standard-form contract emerged to serve these needs.<sup>139</sup>

### 2.5.2 *What is a standard-form contract?*

The term 'standard-form contract' has three possible meanings. The first indicates that a model specimen is used to draft a contract, and this contract is then amended to meet the needs of the contracting parties in given circumstances. Second, it may refer to a contract that is frequently used and has come to be accepted as the form of contract always used for certain transactions. One thinks here typically of a cell phone service agreement – a so-called 'take-it-or-leave-it' contract. Third, it could mean a contract with terms prescribed by statute.<sup>140</sup>

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<sup>136</sup> Aronstam *Freedom of Contract* 188-210.

<sup>137</sup> Khan (2017) *JAASSH* 43; Stoop *LLD* 29.

<sup>138</sup> For a brief history of the use of standard-form contracts, see Aronstam *Freedom of Contract* 16-18; Kessler (1943) *Colum L Rev* 631; Ahdieh (2006) *Mich LR* 1034.

<sup>139</sup> Gluck (1979) *ICLQ* 73; Ahdieh (2006) *Mich LR* 1034; Aronstam *Freedom of Contract* 20.

<sup>140</sup> Aronstam *Freedom of Contract* 18-19.

## The historical and philosophical context of consumer protection

The terms 'inequality of bargaining position', 'boilerplate' and 'contracts of adhesion' originated in the USA and are used to describe characteristics or components of standard-form contracts.<sup>141</sup>

'Boilerplate' refers to the so-called 'building-blocks' of the standard-form contract,<sup>142</sup> and are standard clauses that can be copied and used in the drafting of agreements.<sup>143</sup>

Contracts of adhesion refer to contracts entered into between parties with unequal bargaining power, for example, a cell phone company and an individual consumer. The consumer generally lacks the bargaining power to negotiate freely for bespoke terms and conditions, and is in a take-it-or-leave-it position.<sup>144</sup>

The typical attributes of a standard-form contract are:<sup>145</sup>

- it is generally a printed document containing several clauses in the form of an agreement;
- the contract is drafted by the supplier or seller;<sup>146</sup>
- the supplier generally enters into many identical or near-identical agreements;
- the agreement is entered into on a take-it-or-leave-basis, without any real opportunity or scope for the consumer to negotiate the terms and conditions of the agreement;
- the purchaser or consumer just has to sign the agreement;
- unlike the supplier, the consumer normally does not enter into many of these agreements on a daily basis; and
- normally the only or most important obligation the consumer has is to pay the amounts stipulated in the agreement.

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<sup>141</sup> Kessler (1943) *Colum L Rev* 629-642; Patterson 'invented' the term 'contracts of adhesion' (standard-form contracts) in his article – see Patterson (1919-1920) *HLR* 222 – and further states that this term is not strictly speaking an official legal term. Patterson apparently started using the term contracts of adhesion in the USA. See also Rakoff (1983) *HLR* 1173-1284; Slawson (1984) *U Pitt L Rev* 21-74; Gluck (1979) *ICLQ* 72-90. The doctrine of inequality of bargaining position was successfully applied in, eg, *Clifford Davis Management v WEA Records* [1975] 1 WLR 61 (CA). Also see Aronstam *Freedom of Contract* 20 on the South African position.

<sup>142</sup> Ben-Shahar (2006) *Mich LR* 821.

<sup>143</sup> Cambridge Dictionary available at <https://dictionary.cambridge.org/dictionary/english/boilerplate> (date of use: 23 October 2018); English Oxford Living Dictionaries available at <https://en.oxforddictionaries.com/definition/boilerplate> (date of use: 23 October 2018).

<sup>144</sup> Cornell Law School Legal Information Institute available at [https://www.law.cornell.edu/wex/adhesion\\_contract\\_%28contract\\_of\\_adhesion%29\\_](https://www.law.cornell.edu/wex/adhesion_contract_%28contract_of_adhesion%29_) (date of use: 23 October 2018).

<sup>145</sup> Identified as such by Rakoff (1983) *HLR* 1177; also see Barnes (2007) *WLR* 234-35. An example is a cell phone service agreement.

<sup>146</sup> The seller will probably seek legal advice to have this agreement drafted, and therefore is in an even stronger bargaining position.

The view of consumers towards standard-form contracts can be summarised as follows:<sup>147</sup>

- Consumers accept that they cannot negotiate the individual terms of these agreements.
- Consumers accept that these agreements contain provisions for circumstances that are unlikely to occur.
- Standard-form agreements are often entered into or based, not on the terms of the agreement, but rather on the reputation of the supplier.
- Consumers only read, or deem as important, certain of the indispensable, essential terms and conditions, like the purchase price or monthly instalment, the duration of the agreement, and the delivery date.

### 2.5.3 Criticism of standard-form contracts

Because standard-form contracts are typically used by large businesses with bargaining power, Kessler developed the theory of inequality of bargaining power in the USA.<sup>148</sup> This implies that the consumer – the party who wants the goods – is not in a position to bargain freely, and ends up in a take-it-or-leave-it situation.<sup>149</sup> This is because the seller has a monopoly on the specific product sought, or that all competitors in that specific market sector use the same type of contract. He argues that this practice leads to the formation of industrial empires.<sup>150</sup>

Contracts of adhesion are relevant internationally, and interesting aspects of these contracts have been discussed and extensively argued, especially in the USA.<sup>151</sup> Because of the uniformity created by these contracts of adhesion and the lack of 'irrationality', Kessler is of the view that they could be regarded as having similar binding power to codifications and 'restatements'.<sup>152</sup>

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<sup>147</sup> Barnes (2007) *WLR* 237.

<sup>148</sup> Kessler is generally regarded as the father of the inequality of bargaining power theory in the USA, see Kessler (1943) *Colum L Rev* 629-642; Slawson (1984) *U Pitt L Rev* 32. However, Atiyah argues that long before Kessler, in his book *Wealth of Nations* written between 1783 and 1784, Adam Smith was aware that labourers were not in an equal bargaining position with their employers. See Atiyah *Freedom of Contract* 301 and Smith [https://www.ibiblio.org/ml/libri/s/SmithA\\_WealthNations\\_p.pdf](https://www.ibiblio.org/ml/libri/s/SmithA_WealthNations_p.pdf) 56 (date of use: 17 March 2020). Also see Aronstam *Freedom of Contract* 15, where he refers to other writers and judges who also recognised inequality of bargaining position before Kessler's article in 1943.

<sup>149</sup> South African courts and parliament have acknowledged inequality of bargaining power. Aronstam *Freedom of Contract* 23-24; *Linstrom v Venter* 1957 (1) SA 125 (SWA) 127-128, 131.

<sup>150</sup> Kessler (1943) *Colum L Rev* 632; this also illustrates the intricate relationship between law, economy and sociology.

<sup>151</sup> See for instance the symposium exclusively for that purpose 2005 at the University of Michigan, and the edition of (2006) *Michigan LR* 821.

<sup>152</sup> Kessler (1943) *Colum L Rev* 632-633. A 'restatement' means something that has authority but is not a statute or a court judgment – see <https://definitions.uslegal.com/r/restatement/> (date of use: 2 November 2018). On a slightly different note related to restatement, for a perspective on the restatement of the law on consumer contracts in South Africa, and a comparison with the use,



Aronstam discusses the view that every country's economy should be subjected to the economic power of huge corporations that suppress the influence of the individual. He contends these corporations have to become independent of the individual consumer and the standard-form contract is the means by which to achieve this.<sup>153</sup> Aronstam concludes that the crux of the matter is that huge companies can abuse their substantial economic power to dominate a market sector by way of the standard-form contract. This strengthens these companies' grip on that specific market sector.<sup>154</sup>

Slawson points out that profitability for the supplier and the modern way of life imply the necessity for the consumer to acquire services or goods by way of standard-form contracts. The fact that the products acquired are technologically advanced, that the legal consequences resulting from their use have increased greatly, and finally, the large-scale promotion and advertisement in public media of these products and services, have led to increased expectations from consumers.<sup>155</sup> Consumers accept that the supplier's competition in the marketplace will also make use of a standard-form contract with similar terms and conditions, and therefore offer no resistance to signing these agreements.<sup>156</sup>

#### 2.5.4 Consequences of standard-form contracts

The consequences of standard-form contracts, as well as the attitude of consumers towards these, are accurately captured by Rakoff in the following remark:

'The consumer's experience of modern commercial life is not one of freedom in the full sense posited by traditional contract law, but rather one of submission to organizational domination, leavened by the ability to choose the organization by which he will be dominated.'<sup>157</sup>

Initially, courts applied the same principles of enforcement to standard-form contracts as to individually negotiated contracts,<sup>158</sup> and did not entertain 'fools' who signed documents without reading them.<sup>159</sup> In time, however, courts realised the strict application of rules does not necessarily ensure a fair and just outcome and resorted to the fundamental breach rule as a rule of construction.<sup>160</sup> This rule implies that a contracting party must perform the essence of the agreement before he or she can claim assistance from the courts. Another way to effect fairness was the

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problems, and purpose thereof in the USA, and the practical pitfalls in the consumer-law regime for the South African consumer, see Du Plessis (2018) *SA Merc LJ* 189-215.

<sup>153</sup> Aronstam *Freedom of Contract* 22.

<sup>154</sup> Aronstam *Freedom of Contract* 23.

<sup>155</sup> Slawson (1984) *U Pitt L Rev* 24-25; Barnes (2007) *WLR* 235.

<sup>156</sup> Barnes (2007) *WLR* 237.

<sup>157</sup> Rakoff (1983) *HLR* 1229. See also Barnes (2007) *WLR* 237.

<sup>158</sup> Slawson (1984) *U Pitt L Rev* 46-47; Gluck (1979) *ICLQ* 74-81.

<sup>159</sup> Also see Pound (1909) *YLJ* 454-487 especially 483. The *L'Estrange v F Graucob Ltd* [1934] 2 KB 394, 404 and 407 is a case in point. See Spencer (1973) *CLJ* 104-122 for a discussion of this and other similar cases.

<sup>160</sup> Gluck (1979) *ICLQ* 75-77.

inequality of bargaining power rule.<sup>161</sup> Yet another theory implemented in an attempt to ensure fairness, was the doctrine of informed notice.<sup>162</sup> As seen from the measures used by courts in their efforts to act fairly when deciding disputes based on standard-form contracts, their opinions differed on how to deal with this problem.

Writers have debated the treatment and meaning of contract and of standard-form contracts for years, but there is still no clear answer. Barnes quotes a few writers' remarks on contract law: 'contract law has died, and been resurrected, reconstructed, and transformed'.<sup>163</sup> Slawson argues the new meaning of contract is 'the parties' reasonable expectations from whatever sources they may derive'.<sup>164</sup>

Another complicating factor to bear in mind when interpreting and adjudicating standard-form contracts, is that the law generally fails to keep up with the latest social and technological advances.<sup>165</sup> The legal consequences arising from these new advances, whether technological, sociological, or economic, have increased exponentially as courts attempt to develop the common law so as to keep abreast of these latest developments.<sup>166</sup>

Important and interesting aspects of standard-form agreements and clauses are the following:<sup>167</sup>

- their ambiguity and the resultant use of the *contra proferentem*<sup>168</sup> rule by courts to interpret the contracts/terms and conditions;<sup>169</sup>
- other theories or rules courts have used to effect fairness when interpreting standard-form contracts, as discussed above;
- the argument that standard-form contracts now virtually have the binding power of legislation or so-called restatement;<sup>170</sup>

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<sup>161</sup> *Clifford Davis Management Ltd v WEA Records et al* [1975] 1 WLR 61 (CA); Barnes (2007) WLR 267.

<sup>162</sup> Gluck (1979) *ICLQ* 84-86, 90.

<sup>163</sup> Barnes (2007) WLR 228-229.

<sup>164</sup> Slawson (1984) *U Pitt L Rev* 23. This new meaning was first accepted and applied by the courts in the USA in *C&J Fertilizer Inc v Allied Mutual Insurance Co* 227 NW 2d 169 (Iowa 1975) (hereafter *C&J Fertilizer*). In this decision the court found for the plaintiff based, inter alia, on reasonable expectations and unconscionability. *Farm Bureau Mutual Insurance Co v Sandbulte* 302 NW 2d 104 (Iowa 1981) followed the *C&J Fertilizer dictum* based on reasonable expectations. Also see *Elliot Leases Cars Inc v Quigley* 373 A 2d 810 (RI1977); *Darner Motor Sales Inc v Universal Underwriters Insurance Co* 682 P 2d 388 (Ariz 1984).

<sup>165</sup> Slawson (1984) *U Pitt L Rev* 23.

<sup>166</sup> Slawson (1984) *U Pitt L Rev* 25. Also relevant, to an extent, is Bant (2017) *MLR* 895.

<sup>167</sup> These and other important aspects of boilerplate were discussed at a symposium held specifically on this topic at the University of Michigan in 2005. See <https://pdfs.semanticscholar.org/6b3c/06f4b623c0741b2455a5a649df5da8650348.pdf> (date of use: 23 October 2018).

<sup>168</sup> This means that words are interpreted against the party who has used them and is also referred to as the 'doubtful provenance rule'. Also see *verba fortius*, which means the same. See Hiemstra & Gonin *Drietalige Regswoordeboek* 169 read together with 304.

<sup>169</sup> Boardman (2006) *Mich LR* 1105-1128.

<sup>170</sup> Choi & Gulati (2006) *Mich LR* 1129-173; Kessler (1943) *Colum L Rev* 641.

- the fact or possibility that standard-form contracts have changed the contract theory;<sup>171</sup>
- the possibility and legal binding nature of online disclosure of boilerplate standard terms;<sup>172</sup>
- the effect standard-form contracts have on the ideal of freedom of contract;<sup>173</sup>
- the effect of standard-form contracts, especially in terms of legislation, on the common-law of contract, its principles, and its policies;<sup>174</sup>
- the argument that the terms and conditions of standard-form agreements should be presumed unenforceable;<sup>175</sup>
- the potential unfairness and unconscionability of standard-form contracts;<sup>176</sup> and
- the question whether courts should treat standard-form contracts, and normally-negotiated and free contracts the same?<sup>177</sup>

These factors will, where applicable, be taken into account and discussed in the relevant jurisdictions in the following chapters of this study.

#### 2.5.5 Concluding remarks: Standard-form contracts

It was soon realised that merely because a consumer signed a standard-form agreement, did not mean he or she had read and understood it.<sup>178</sup> Standard-form contracts, boilerplate contracts, and contracts of adhesion are all manifestations of the demise of the ideals of freedom to contract, individualism, free and open negotiation, equal bargaining status, and ultimately, the sanctity of contract and signify the rise of collectivism. However, standard-form contracts are a reality that we have to face – a reality which has created industrial empires and impacts on the economy. Standard-form contracts affect the rights of sellers or suppliers and ultimately the consumer, all of which emphasises the need for consumer protection measures.

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<sup>171</sup> Gluck (1979) *ICLQ* 72-90; Slawson (1984) *U Pitt L Rev* 23; Barnes (2007) *WLR* 236-239.

<sup>172</sup> Hillman (2006) *Mich LR* 837-856.

<sup>173</sup> Kessler (1943) *Colum L Rev* 629-642.

<sup>174</sup> Also see Bant (2017) *MLR* 895 on the effect of consumer legislation, and standard-form contracts in terms thereof, on the interpretation and logical development of the common-law of contract and its principles and policies.

<sup>175</sup> Rakoff (1983) *HLR* 1174-1284.

<sup>176</sup> Khan *Contract and Mercantile Law* vol 1 35; Mann (2006) *Mich LR* 918-919; Slawson (1984) *U Pitt L Rev* 46-47, 52-53; Barnes (2007) *WLR* 272-273.

<sup>177</sup> Barnes (2007) *WLR* 252-274.

<sup>178</sup> *Unico v Owen* (1967) 50 NJ 101 232 A.

## 2.6 *The United Nations Guidelines for Consumer Protection*<sup>179</sup>

### 2.6.1 *Introduction*

The need for international guidelines for consumer protection legislation dates back to the late 1970s when governments realised that consumer protection was essential for a healthy economy and a country's social development.<sup>180</sup> In 1979 the United Nations<sup>181</sup> investigated the needs in consumer protection and after reviewing the resulting research and reports, adopted the first version of the Guidelines in 1985. The philosophy underlying the Guidelines is that consumer protection is a basic right of all people. An important principle the UN emphasised was that the Guidelines would result in higher standards of living and social development,<sup>182</sup> and that consumer protection is not a luxury but an essential requirement for developing countries and poor and disadvantaged societies.<sup>183</sup>

### 2.6.2 *The Guidelines*

The purposes of the Guidelines are:

- to assist countries to protect consumers;
- to facilitate production and distribution to the needs of consumers;
- to ensure high levels of ethical conduct;
- to eliminate abusive trade practices;
- to enable consumers to develop consumer activism;
- to promote international co-operation in consumer protection;
- to develop markets so as to offer consumers a better array of choices at more competitive prices; and finally
- to develop consumerism in a way that ensures sustainable consumption.<sup>184</sup>

The Guidelines also provide general principles in Part II, sections 2-8, to ensure, inter alia, that governments have a strong consumer protection policy that ensures the health and safety of consumers. The policy should also guard consumers' economic interests and provide them with sufficient information to make informed

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<sup>179</sup> Available at [https://www.un.org/esa/sustdev/publications/consumption\\_en.pdf](https://www.un.org/esa/sustdev/publications/consumption_en.pdf) (date of use: 11 February 2020). See para 1.

<sup>180</sup> Harland (1991) *JILI* 189.

<sup>181</sup> Hereafter UN. The UN was founded after the Second World War to work towards international peace and security, to develop better diplomatic relations between nations, and to promote human rights, social progress, and better living conditions. For more information on the history and purposes of the UN see <https://www.un.org/un70/en/content/history/index.html> (date of use: 16 March 2020). The UN adopted general guidelines for consumer protection on 9 April 1985 see [https://www.un.org/esa/sustdev/publications/consumption\\_en.pdf](https://www.un.org/esa/sustdev/publications/consumption_en.pdf) (date of use: 11 February 2020); (UN Guidelines).

<sup>182</sup> UN Charter art 55 1(a).

<sup>183</sup> Harland (1991) *JILI* 193.

<sup>184</sup> Section 1 of the UN Guidelines.

decisions. In addition, it should educate consumers, provide them with redress, and encourage consumer activism and participation. In addition, Part III provides guidelines relating to the above objectives and principles. The Guidelines have been criticised for not addressing consumer representation as this could pose problems in practice.<sup>185</sup>

### *2.6.3 The legal nature of the UN Guidelines for Consumer Protection*

The UN Guidelines are neither compulsory nor binding internationally.<sup>186</sup> Uruguay, Ecuador, South Korea, Australia, and Malaysia are among the countries which have implemented the Guidelines.<sup>187</sup> The legal nature of legislation enacted to implement these guidelines also differs. The approach of countries to implementing consumer protection legislation can be divided into two main schools of thought. On the one hand, common-law countries such as England, Singapore, South Africa, and Malaysia, base their legislation on the prohibition of certain types of conduct. On the other hand, countries like Germany and the Scandinavian countries base their consumer legislation on a general clause, based on principle, prohibiting general unfair and misleading conduct.<sup>188</sup> According to Harland, legislation needs to combine both these approaches to be effective,<sup>189</sup> for example, the Australian legislation.

### *2.6.4 Concluding remarks: UN Guidelines for Consumer Protection*

It is safe to say the Guidelines have proved successful to the extent that many countries have realised the importance of addressing consumer protection measures on an ongoing basis in order to stimulate economic and social development and growth. They have ensured a greater measure of uniformity in the resulting protective measures internationally. Benöhr contends the fact that the Guidelines have been adopted and applied internationally, is evidence that consumer rights are regarded as human rights.<sup>190</sup>

## *2.7 Conclusion: Chapter 2*

Historically, consumer protection measures have been regulated in various ways, initially through laws, religious prescripts, moral codes, and quasi-constitutional documents. Although the philosophy of absolute freedom of contract appears ideal

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<sup>185</sup> Harland (1991) *JILI* 195.

<sup>186</sup> Harland (1991) *JILI* 196.

<sup>187</sup> Harland (1991) *JILI* 197-198.

<sup>188</sup> Harland (1991) *JILI* 204-205.

<sup>189</sup> Harland (1991) *JILI* 205-206.

<sup>190</sup> Benöhr *EU Consumer Law and Human Rights* 45, 46, 75. The South African Constitution does not specifically refer to consumer rights. However, when the Constitution and the CPA are read together, it is safe to assume they can be regarded as an aspect of human rights in South Africa. As this aspect is merely an aside, it is only mentioned very briefly in Ch 4.

from a theoretical, philosophical, and academic perspective, unfortunately reality has proven quite different. The theory proved inadequate in ensuring adequate contractual justice, fairness, and protection for all parties involved, especially in a modern consumer society. This is because consumers are not necessarily equal – levels of literacy, education, sophistication, care, economic knowledge, and proficiency differ widely. This, in turn, complicates their equitable competition with large companies<sup>191</sup> as regards financial and legal expertise, and a high level of technical knowledge.<sup>192</sup>

The recognition of this need for consumer protection was realised and culminated in the UN Guidelines for Consumer Protection. The Guidelines set uniform international standards and have been well accepted and implemented. When researching and analysing consumer legislation it is imperative to bear in mind that the mere fact that a party may not have unlimited freedom, or has no freedom at all to contract, does not necessarily result in him or her suffering harm.<sup>193</sup> Standard-form contracts and legislation imposing measures or prescribed forms for contracts can have many advantages. For instance, standard-form contracts and legislative provisions can save time, are cost effective, assist in economic growth, ease administration, and could even contribute to the equal treatment of all consumers. However, the potential for exploitation remains, and the legislature and courts should bear this in mind.

Having examined the relevant historical and philosophical aspects of consumer law, I can proceed to analyse selected aspects of the common law that are relevant when discussing, interpreting, and adjudicating fixed-term contracts under section 14 of the CPA.

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<sup>191</sup> As seen from the brief historical background, apart from consumer protection measures, competition law is the other side of the consumer-law coin. See, eg, the Indian texts referred to in para 2.2.4. When public competition law is regulated effectively it will simultaneously result in the protection of consumers as collusion, monopolies, oligarchies, price fixing, etc are regulated to benefit the economy, sellers, and ultimately consumers. See Brassey *Competition Law* 2; the Competition Act 89 of 1998 (Competition Act). Because of the limited scope of this thesis an in-depth discussion of competition law and the full extent of the interaction between consumer law and competition law is not possible.

<sup>192</sup> Slawson (1984) *U Pitt L Rev* 61-62.

<sup>193</sup> This principle was stated clearly by Coetzee J in *Western Bank Ltd v Sparta Construction Co* [1975] 1 All SA 224 (W) 226.

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## **CHAPTER THREE: South Africa: The common-law position of consumers under fixed-term contracts**

### *3.1 Introduction*

#### *3.1.1 Introduction and background*

In this chapter, I analyse and discuss the common-law position of contracting parties, what protection is at their disposal, and their respective rights and remedies in the event of material default, breach, or premature termination of an agreement.

The common-law position of parties remains relevant as section 2(10) of the CPA expressly retains consumers' common-law rights.<sup>1</sup> When a consumer enters into a fixed-term agreement, the provisions of section 14 apply to the contract. In the event of a dispute based on a fixed-term agreement, a consumer can choose to base his or her claim either on the provisions of the CPA, or on the common law as both systems apply. The common-law principles and the CPA framework are intertwined, as many principles in the CPA are based on the common law, and the provisions of the CPA cannot be interpreted or applied without using common-law principles.<sup>2</sup> In some circumstances, it may be difficult for a consumer to choose between basing his or her claim on the common law or on the CPA provisions.<sup>3</sup>

This discussion is limited to terms in contracts contemplated in section 14 of the CPA. As it is impractical to discuss all common-law aspects of consumer law in detail, I offer an overview of the common-law principles relevant to fixed-term agreements. I also sketch the common-law rights and remedies available to parties on default, breach, or termination of an agreement. In this way, the chapter offers perspective on the common-law position so as to identify how it differs from (or is in line with) the position under section 14 of the CPA which is analysed in Chapter 4.

While Roman-Dutch law forms the basis of South African common law there are, for historical reasons, many English sources and principles incorporated in our legal system and precedents.<sup>4</sup>

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<sup>1</sup> Section 2(10) of the CPA provides: 'No provision of this Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law.' Section 2(10) of the CPA, its meaning, and its interpretation will be discussed in greater detail in Ch 4 para 4.2.4.

<sup>2</sup> Van Eeden & Barnard *Consumer Protection* 59-60.

<sup>3</sup> See the discussion in Van Eeden & Barnard *Consumer Protection* 404-406, 529.

<sup>4</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 3-4; Williams (1909-1910) *Yale LJ* 157; Otto (2010) *Fundamina* 257; Pretorius (2004) *THRHR* 185-186.

## South Africa: The common-law position of consumers under fixed-term contracts

The common law is an uncodified body of law consisting of court judgments and legal rules, and is largely based on precedent.<sup>5</sup> The Constitution<sup>6</sup> – the Bill of Rights in particular<sup>7</sup> – has an important impact, as in a constitutional democracy the constitution binds all courts. Therefore, our courts must apply and develop the law in accordance with the purpose, substance, character and scope of the Bill of Rights.<sup>8</sup>

While it is accepted that in terms of section 39(2) of the Constitution the common law must be developed to reflect the ‘spirit, purport and objects’ of the Bill of Rights,<sup>9</sup> the Constitutional Court has also warned that not all pre-Constitution decisions were inherently tainted or immoral. Courts must, therefore, be cautious not to jeopardise legal certainty while developing the common law.<sup>10</sup> The Constitutional Court identified the following rules for the development of the common law in *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd and Another*.<sup>11</sup>

- The court must establish exactly what the common-law position is on a particular aspect.
- The court must examine the purpose of the common-law principle.
- The court must consider whether the common-law principle conflicts with the Bill of Rights and should be reformed.
- If the common-law rule or principle is contrary to the Bill of Rights, the court can decide how it should be amended or developed in accordance with constitutional principles.
- Finally, the court should consider and anticipate the consequences of the amendment or development on the field of law involved.

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<sup>5</sup> See the article by Maswazi (2017) *De Rebus* 28 for a discussion of the intricacies of *stare decisis* in practice and the effect of s 39(2) of the Constitution on the *stare decisis* rule. Also see *Camps Bay Ratepayers’ and Resident Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) (hereafter *Camps Bay*) for an explanation by Brand AJ, as he then was, of the *stare decisis* rule. He states that *stare decisis* does not merely imply the slavish following of orders of courts of higher authority, but is the epitome of the rule of law itself, which in turn, is an essential element of the Constitution. He emphasised that deviation from the rule could lead to legal disorder, para [28].

<sup>6</sup> Constitution of the Republic of South Africa Act, 1996 (the Constitution).

<sup>7</sup> Section 39(2) Ch 2 of the Constitution. *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 25 (CC) paras [31]–[34], [36]–[37] (hereafter *Everfresh*).

<sup>8</sup> Van Rensburg & Van der Merwe *Law of Contract* 11; *Phumelela Gaming and Leisure Limited v Gründlingh and Others* 2006 (8) BCLA 883 (CC) paras [26]–[27] (hereafter *Phumelela*).

<sup>9</sup> Section 39(2) of the Constitution provides: ‘When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’

<sup>10</sup> The court also emphasised that courts should not be the main source of legal reform – that obligation lies with the legislature. See *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd and Another* 2016 (1) SA 621 (CC) para [40].

<sup>11</sup> 2016 (1) SA 621 (CC) para [39] (hereafter *Mighty Solutions*). Also see *Beadica* 231 CC and *Others v Trustees for the time being of the Oregon Trust and Others* (CCT109/19) [2020] ZACC 13 (17 June 2020).

In addition, ubuntu, a customary-law principle<sup>12</sup> which implies the consideration of empathy, humanity, respect, fairness,<sup>13</sup> and good faith,<sup>14</sup> also plays an important role in the courts' application and interpretation of the law.<sup>15</sup>

### 3.1.2 History and development of the common law

Roman law, which plays an important role in our common-law of contract, developed and was refined during the Principate<sup>16</sup> between 27 BC and 284 AD.<sup>17</sup> Justinian ordered a codification of Roman law – the *Corpus Iuris Civilis*<sup>18</sup> – during his reign from 527 AD to 565 AD.<sup>19</sup>

After Justinian's death, Roman law entered a period of stagnation to be rediscovered only in the eleventh century by Pepo, a law teacher at the University of Bologna in Italy.<sup>20</sup> While the existing local tribal, regional, and provincial legislation on the continent met the needs of a simple agricultural community, it was not sufficiently sophisticated for a fast-developing commercial society.<sup>21</sup> As a result, the effective Roman law principles were received and applied in Europe, and especially in the Netherlands, from the sixteenth century onwards.<sup>22</sup> The writings of Dutch

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<sup>12</sup> See *Mighty Solutions* para [1] where the Constitutional Court acknowledges the importance of customary law.

<sup>13</sup> See Stoop *LLD* 210-216 for a full discussion of fairness in the regulation of contracts under the CPA.

<sup>14</sup> The exact application, role and importance of the requirement of parties' good faith remains controversial in the South African common law, see *Eerste Nasionale Bank van Suidelike Afrika v Saayman* 1997 (4) SA 302 (SCA), specifically the judgment of Olivier JA, and in contrast to that the majority judgment in *Brisley v Drotosky* 2002 (4) SA 1 (SCA). See also Hutchison *Good Faith* 240 where he says that it appears South African law is leaning towards recognising good faith – of course this was before the decision in *Brisley v Drotosky*. See Beatson & Friedman *Good Faith* 56 for the English law position; Louw (2013) *PELJ* 44-110; Van der Sijde *LLM* 18-25, 29, 32, 37-38; Brand (2009) *SALJ* 71, 81-83, 87-89. For an American perspective see Burton (1980) *HLR* 369, 371, 385-387, 403; Hoeben et al available at <https://www.ensafrica.com/news/Ubuntu-and-the-law-promoting-good-faith-and-fairness> (date of use: 4 October 2018); Hutchison (2011) *SALJ* 273, 295-296.

<sup>15</sup> *S v Makwanyane* 1995 (6) BCLR 665 (CC); *Everfresh* paras [23]–[24]. For an in-depth analysis and discussion of ubuntu see Du Plessis *LLD*, especially 391; Bennett (2011) *PELJ* 30, 44-46; Layton-McCann *LLM* 5-16.

<sup>16</sup> The first period of the Roman Empire, starting with emperor Augustus until the Imperial Crisis in 284 AD, Van Zyl *Geskiedenis* 4-5; Kaser *Roman Law* 4.

<sup>17</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 2; Van Zyl *Geskiedenis* 5, 21; Kaser *Roman Law* 2.

<sup>18</sup> Meaning 'body of civil law' see *Cassells Latin Dictionary* 154. It comprised of four parts, namely the Digest – the codification of the opinions of Roman jurists mainly on private law; the Institutes – a textbook for students; the *Codex* – a compendium of existing legislation and the update thereof; and the *Novellae* – a compendium of all legislation enacted after the abovementioned works to update the codification of the law. Van Zyl *Geskiedenis* 65, 331, 109; Van Jaarsveld & Oosthuizen *Handelsreg* 2; Van Zyl *Geskiedenis* 59-64, 66; Kaser *Roman Law* 7.

<sup>19</sup> Van Zyl *Geskiedenis* 7; Van Jaarsveld & Oosthuizen *Handelsreg* 2.

<sup>20</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 2; Van Zyl *Geskiedenis* 68-69; Kaser *Roman Law* 9.

<sup>21</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 2; Kaser *Roman Law* 10.

<sup>22</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 2; Van Zyl *Geskiedenis* 69; Kaser *Roman Law* 10.

jurists such as De Groot (Grotius), Voet, Van Leeuwen, Van Bynkershoek, Van der Keessel and Van der Linden,<sup>23</sup> are still held in high regard by South African courts.<sup>24</sup>

The Dutch occupation of the Cape by the VOC in 1652<sup>25</sup> brought Roman-Dutch principles to South Africa. Despite subsequent British occupation(s) of South Africa or parts of South Africa, English law was never formally imported into the South African legal system.<sup>26</sup> However, South African law and precedent, in particular procedural law, were influenced by English law as a result of British judges and magistrates who came to South Africa and South African lawyers who studied in England. At certain times in our history, our courts also relied on English court decisions.<sup>27</sup> Finally, many pieces of South African legislation, in particular in the field of mercantile law, are based on corresponding English legislation.<sup>28</sup>

### 3.2 *South African law of obligation and contract*

#### 3.2.1 *Introduction*

I here discuss the common law as it relates to fixed-term contracts. The common law of contract remains relevant in that it forms the foundation of all contracts, whether concluded under the common law or the CPA.

I will start by briefly considering concepts relevant or important to the common law of contract, deal with the parties to an agreement, and mention the importance of consensus as a requirement for a valid agreement. After that, I will proceed to discuss the importance of the *iusta causa* of an agreement, and touch on the lawfulness of contracts, possibility of performance, and set out the formalities required for the conclusion of agreements. Then, I will examine the parole evidence rule, the duration of contracts, penalty clauses and other conditions that parties can use in agreements to protect themselves, or provide for anticipated events. Next, I will touch on misrepresentation, look at the fictional fulfilment of agreements, and

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<sup>23</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 3; Williams (1909-1910) *Yale LJ* 156.

<sup>24</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 3. The Privy Council confirmed this in *Pearl Assurance Co v Union Government* 1934 AD 560, 563; *Preller and Others v Jordaan* 1956 (1) SA 483 (A) 483-506; also see the minority judgment in *Le Roux v Dey* 2011 (3) SA 274 (CC) para [198]; and *Cloete v Van Meyeren* [2019] 1 All SA 662 (ECP) paras [20], [22], [34].

<sup>25</sup> Vereenigde Oostindische Compagnie or Dutch East India Company (DEIC), a Dutch corporation established to trade with India and other South-East Asian countries. See <https://www.rijksmuseum.nl/en/rijksstudio/timeline-dutch-history/1602-trade-with-the-east-voc> (date of use: 19 June 2018).

<sup>26</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 4; Bradfield *Christie's Law of Contract* 9-10; Otto (2010) *Fundamina* 257-258.

<sup>27</sup> For instance, the Turquand rule that was formulated in the case of *Royal British Bank v Turquand* (1856) 6 E & B 327. This rule was accepted as part of South African law in *Mine Workers' Union v Prinsloo* 1948 (3) SA 831 (A).

<sup>28</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 4. For example, company law, law of negotiable instruments, and insolvency law. See Bradfield *Christie's Law of Contract* 11; Naudé (2018) *JCP* 412; Pretorius (2004) *THRHR* 179,186-188.

consider leases, as fixed-term agreements have an important effect on lease agreements. After that I will summarise the position on breach of agreements, highlight the remedies parties have, and then consider the termination of agreements, before concluding this chapter.

### 3.2.2 Definitions and concepts

A contract is an agreement entered into by two or more parties with the aim of creating a binding legal relationship between them.<sup>29</sup> A more comprehensive definition is:

‘A contract is an agreement between two or more persons (parties) that is intended by them to create and define, or vary, or extinguish, a right or rights *in personam*<sup>30</sup> (the correlative being an obligation or obligations) between the parties to the agreement, such right or rights pertaining to the giving or doing of, or the refraining from doing, something.’<sup>31</sup>

A contract is one of the ways in which an obligation is created.<sup>32</sup> The Roman concept of an obligation (*obligatio*) is a legal tie in terms of which one party is obliged to deliver a service or goods to another, generally in return for payment.<sup>33</sup> This principle still applies, and the relationship results in a right to act against the debtor (*actio in personam*). It, therefore, creates both the concepts ‘obligation to deliver’ and ‘liability’.<sup>34</sup> The creditor has the right to claim performance of the debtor’s obligation, and the debtor has the obligation to either pay a service fee or purchase price, or

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<sup>29</sup> Du Bois et al *Wille’s Principles* 736; Sharrock *Business Transactions* 54; De Wet & Van Wyk *Kontraktereg* 4; Zulman & Dicks *Norman’s Purchase and Sale* 1; Van Jaarsveld & Oosthuizen *Handelsreg* 19; Bradfield *Christie’s Law of Contract* 10; *Conradie v Rossouw* 1919 AD 276, 279 (hereafter *Conradie*). For historical background and a detailed discussion see Khan et al *Contract and Mercantile Law* vol 1, 1-11.

<sup>30</sup> When discussing the basic principles of our common law I use the Latin terminology which is more concise to express the principle at stake.

<sup>31</sup> Khan et al *Contract and Mercantile Law* vol 1, 2.

<sup>32</sup> The other being delict or a variety of other causes including, but not limited to unjust enrichment. Gaius *Institutiones* 3.88 available at [http://legalhistorysources.com/Law508/Roman%20Law/GaiusInstitutesCommentary.htm#hd\\_if0533\\_head\\_133](http://legalhistorysources.com/Law508/Roman%20Law/GaiusInstitutesCommentary.htm#hd_if0533_head_133) (date of use: 4 November 2019) ‘... *omnis enim obligatio vel ex contractu nascitur vel ex delicto*’, meaning ‘indeed every obligation comes into existence either by way of contract or by way of delict’. See van Zyl *Geskiedenis* 3-4; Kaser *Roman Law* 167 states that this obligation came into existence in place of *membrum ruptum* which literally meant breaking or tearing a limb as vengeance, the state intervened and instituted pecuniary damages by introduction in the XII Tables. Literally, the latter means ‘ruptured limb’. See *Cassell’s Latin Dictionary* 527, 367; Du Bois et al *Wille’s Principles* 1091-1092, Bradfield *Christie’s Law of Contract* 5; Sharrock *Business Transactions* 3-7.

<sup>33</sup> Van Zyl *Geskiedenis* 247; Zulman & Dicks *Norman’s Purchase and Sale* 2; De Wet & Van Wyk *Kontraktereg* 1; Du Bois et al *Wille’s Principles* 738; Sharrock *Business Transactions* 88-89. The doctrine of consideration does not form part of South African law after the *Conradie* case where the court decided that the intention to contract is sufficient for the contract to come into existence and that there is no need for consideration to be agreed upon. In normal circumstances, and especially in contracts relevant to this thesis, there will be a purchase price or remuneration in the agreement.

<sup>34</sup> Van Zyl *Geskiedenis* 247; De Wet & Van Wyk *Kontraktereg* 1; Hutchison (2013) *Stell LR* 28-29.

perform a service.<sup>35</sup> For the purpose of this thesis, I focus on the basic form of agreement involving one party on either side, and the most common commercial contracts<sup>36</sup> as the emphasis of the thesis is on fixed-term consumer agreements under section 14 of the CPA.<sup>37</sup>

In general, the most important requirement for the creation of a contract is consensus or agreement between the parties<sup>38</sup> – no obligation arises if the parties do not intend to create one.<sup>39</sup> However, there are other general legal requirements which must be met if there is to be a valid and binding contract. Parties to the agreement must have contractual capacity, must comply with any formal requirements, the agreement must be physically and legally possible, and performance of the contract must be lawful.<sup>40</sup>

Once parties have concluded an agreement, the maxim *pacta servanda sunt*<sup>41</sup> applies. This maxim is one of the basic principles of contract law and its purpose is to ensure certainty in commerce.<sup>42</sup> It is a maxim which the courts have always applied.<sup>43</sup>

Agreements consist of clauses and stipulations divided into:

- *essentialia* – the essential elements of a legal act or contract,<sup>44</sup>

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<sup>35</sup> De Wet & Van Wyk *Kontraktereg* 1; Du Bois et al *Wille's Principles* 738; Sharrock *Business Transactions* 3, 747.

<sup>36</sup> The most pertinent example being the purchase of a cell phone with airtime included, from a cellular service provider.

<sup>37</sup> Although a contract can also have more than one party on either side, and the relationship can be intricate depending on the type of agreement, the basis of the obligation remains that of a debtor on the one side, and a creditor on the other. De Wet & Van Wyk *Kontraktereg* 2; Van Zyl *Geskiedenis* 268.

<sup>38</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 20; Van Zyl *Geskiedenis* 255; Bradfield *Christie's Law of Contract* 2, 29; Pretorius (2004) *THRHR* 388; Pretorius (2004) *THRHR* 565.

<sup>39</sup> *Conradie* 287-290; Van Zyl *Geskiedenis* 255.

<sup>40</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 21; Hutchison et al *Law of Contract* 6; Du Bois et al *Wille's Principles* 736.

<sup>41</sup> Meaning that agreements are binding and should be observed. See Hiemstra & Gonin *Drietalige Regswoordeboek* 251.

<sup>42</sup> Du Bois et al *Wille's Principles* 737; Van Huyssteen et al *Contract* 10-11 Hutchison et al *Law of Contract* 34. See Ch 2 para 2.4.2; Eiselen (1989) *THRHR* 516, 520-523. For a detailed discussion of the historical development of this maxim see Visser (1984) *SALJ* 641-655. See the recent judgment of *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* (CCT109/19) [2020] ZACC 13 (17 June 2020) [83-87].

<sup>43</sup> See Hawthorne (2014) *PER* 2822-2839 for a discussion of the court's duty to balance the constitutional values of freedom and dignity and the maxim *pacta servanda sunt*; *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 (2) SA 314 (SCA) para [32] (*Mohamed's Leisure*); *Brisley v Drotsky* 2002 (4) SA 1; *Napier v Barkhuizen* 2006 (4) SA 1 (SCA).

<sup>44</sup> Hiemstra & Gonin *Drietalige Regswoordeboek* 184; Hutchison et al *Law of Contract* 276; Du Bois et al *Wille's Principles* 971; Van Jaarsveld & Oosthuizen *Handelsreg* 22. These aspects are important as they form the essence of consumer agreements. These are, depending on the legal nature of the agreement, the parties to the agreement, the legal nature of the agreement, for

- *naturalia* – the natural components of a contract;<sup>45</sup> and
- *incidentalialia* – the non-essential components of a contract.<sup>46</sup>

The requirements for valid and binding contracts are now analysed and applied to fixed-term contracts.

### 3.2.3 *Parties to an agreement and the capacity to contract*

Freedom of contract is the cornerstone of the law of contract.<sup>47</sup> The parties to an agreement can, as a rule, enter into an agreement, contract, negotiate, and arrange their affairs with whom they wish and in any way they wish.<sup>48</sup> Even if a party concludes a contract to his or her detriment,<sup>49</sup> the courts cannot come to his or her assistance unless grounds for repudiation can be established.<sup>50</sup> However, freedom of contract is not unlimited in that the Constitution,<sup>51</sup> public interest,<sup>52</sup> ubuntu,<sup>53</sup> and good faith<sup>54</sup> must all be considered when interpreting the concept.<sup>55</sup> Furthermore,

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instance sale or lease, the purchase price or consideration, and when and where it is to be paid, the *merx* and the delivery or transfer thereof. For more information on the *essentialia* see Hutchison et al *Law of Contract* 237.

<sup>45</sup> Hiemstra & Gonin *Drietalige Regswoordeboek* 232; Hutchison et al *Law of Contract* 404-405; Du Bois et al *Wille's Principles* 790; Van Huyssteen et al *Contract* 276-277; Van Jaarsveld & Oosthuizen *Handelsreg* 22. These terms are also relevant, although not regarded as important as the essential elements.

<sup>46</sup> Also sometimes referred to as *accidentalialia*, Hiemstra & Gonin *Drietalige Regswoordeboek* 149; Hutchison et al *Law of Contract* 405; Van Huyssteen et al *Contract* 277-278; Van Jaarsveld & Oosthuizen *Handelsreg* 22; Du Bois et al *Wille's Principles* 1020. These aspects will normally be regarded as irrelevant as regards a dispute, Hutchison et al *Law of Contract* 405.

<sup>47</sup> Bradfield *Christie's Law of Contract* 402; *Law Union and Rock Insurance Co Ltd v Carmichael's Executor* 1917 AD 593, 598. The history, philosophy, interpretation and development of this principle is discussed in greater detail in Ch 2 para 2.4.

<sup>48</sup> De Wet & Van Wyk *Kontraktereg* 6 and 130; Van Huyssteen et al *Contract* 10; Bradfield *Christie's Law of Contract* 210, 402, 518; *Printing Law Union and Rock Insurance Co Ltd v Carmichael's Executor* 1917 AD 593, 598; *Printing and Numerical Registering Company v Sampson* 1875 LR 19 Eq 462, 465.

<sup>49</sup> *Wells v South African Alumenite Company* 1927 AD 69, 73; *Burger v Central South African Railways* 1903 TS 571 (hereafter *Burger*); *Printing and Numerical Registering Company v Sampson* 1875 LR 19 Eq 462, 465.

<sup>50</sup> *Burger* 578-579. This principle was confirmed in *Brink v Humphries and Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) para [11] (hereafter *Brink*); also see in general Khan et al *Contract and Mercantile Law* vol 1 31-36.

<sup>51</sup> *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 16-22 (hereafter *Brisley*); *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) 8-9.

<sup>52</sup> *Burger* 579; *Basson v Chilwan* 1993 (3) SA 742 (A); *Ep Minister of Justice: in re Nedbank Ltd v Abstein Distributors and Other* 1995 (3) SA 1 (A) 20-21.

<sup>53</sup> *S v Makwanyane* 1995 (6) BCLR 665 (CC); *Everfresh* paras [23]–[24]; for an in-depth analysis and discussion of ubuntu see Du Plessis *LLD* 391; Bennett (2011) *PELJ* 30, 44-46.

<sup>54</sup> Layton-McCann *LLM* 5-16; Louw (2013) *PELJ* 45-110; Van Huyssteen *Contract* 195; Hutchison et al *Law of Contract* 21.

<sup>55</sup> Du Bois et al *Wille's Principles* 737; *Brisley* paras [69]–[76], [93].



the principle of freedom of contract, socio-economic changes, and international legislative trends ensure that freedom of contract is constantly evolving.<sup>56</sup>

The maxim *caveat subscriptor*<sup>57</sup> is linked to the principle of freedom of contract. *Caveat subscriptor* warns a signatory to read and understand any document he or she signs,<sup>58</sup> as signature of an agreement has serious consequences for contracting parties. Signatories are bound by the terms and conditions to which they have agreed, even if they have failed to read them.<sup>59</sup> Sharrock concludes that a signatory to an agreement will only be able to escape liability if he or she can prove that there was no consensus;<sup>60</sup> that this lack of consensus was material; and that he or she communicated his or her dissent to the other contracting party.<sup>61</sup>

A party to an agreement must have contractual capacity, that is, the ability to both enter into an agreement and to be bound by its terms and conditions.<sup>62</sup> All persons are deemed to have capacity to contract unless proven otherwise.<sup>63</sup>

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<sup>56</sup> See Ch 2 para 2.4. For a discussion of the ideology of contract law see Pretorius (2003) *THRHR* 638.

<sup>57</sup> Meaning beware he who signs, also known as *caveat emptor* (buyer beware) or *caveat scriptor* Cassell's *Latin Dictionary* 96, 578. For a detailed discussion see Bradfield *Christie's Law of Contract* 205-210.

<sup>58</sup> Bradfield *Christie's Law of Contract* 205; *Burger*. This maxim is especially significant in standard-form contracts in which purchasers have no freedom to negotiate individual terms and conditions. This principle is discussed in greater detail in Ch 2 para 2.4; *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) 471-473 (hereafter *Fairmead*); Sharrock *Business Transactions* 77-78; *Brink v Humphries and Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) paras [10]-[12] and the dissenting judgment para [35] (hereafter *Brink*); Sharrock (1989) *SALJ* 458.

<sup>59</sup> *Fairmead* 471-473; also see standard form contracts on this principle as discussed in Ch 2 para 2.5. In *Brink* para [12] this principle was relaxed somewhat as the majority ruled that the respondent's conduct was misleading to such an extent that the appellant erroneously signed an application for credit without realising that he was also signing a suretyship. This principle was also relaxed in *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA) para [33]. I submit that the dissenting judgment in *Brink* is correct, and that the respondent's conduct cannot be viewed as misrepresentation because the suretyship was clearly printed at the bottom of the application form, just above the appellant's signature, although the heading of the document did not reveal this – see *Brink* paras [35]–[37].

<sup>60</sup> See discussion of consensus in para 3.2.4.

<sup>61</sup> Sharrock *Business Transactions* 78; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

<sup>62</sup> De Wet & Van Wyk *Kontraktereg* 55; Zulman & Dicks *Norman's Purchase and Sale* 3; Van Jaarsveld & Oosthuizen *Handelsreg* 20; Bradfield *Christie's Law of Contract* 265; Conradie 276.

<sup>63</sup> De Wet & Van Wyk *Kontraktereg* 55; Bradfield *Christie's Law of Contract* 165; Du Bois et al *Wille's Principles* 146-147; Van Jaarsveld & Oosthuizen *Handelsreg* 61-62. Examples of parties who do not have the capacity to contract are persons under the influence of alcohol or narcotics, persons of unsound mind, minors, prodigals, and spouses married in community of property and acting without the assistance of the other spouse when required. See De Wet & Van Wyk *Kontraktereg* 55-82; Du Bois et al *Wille's Principles* 752; Van Jaarsveld & Oosthuizen *Handelsreg* 61-62; Bradfield *Christie's Law of Contract* 265-293; Matrimonial Property Act 88 of 1984 (hereafter *Matrimonial Property Act*) specifically s 15 dealing with the powers of spouses; De Wet & Van Wyk *Kontraktereg* 69-82; Although some authors give the impression that only women married in community of property lack the capacity to enter into agreements without assistance, both parties to the marriage in community of property are affected equally by s 15 of the *Matrimonial Property Act*, see Zulman & Dicks *Norman's Purchase and Sale* 20-23 in this regard; Bradfield *Christie's Law of Contract* 268-271.

Because of the importance of consensus between contracting parties, it deserves closer attention.

### 3.2.4 Consensus

#### 3.2.4.1 Introduction

No agreement comes into being without consensus between the parties.<sup>64</sup> The parties must agree on the nature and performance of the agreement,<sup>65</sup> the purchase price or economic value of the agreement,<sup>66</sup> and parties must have the intention to conclude contractual obligations with commercial consequences.

There are different theories on the types of consensus required, which can all play a role when entering into a contract under section 14 of the CPA. Three theories are considered, each of which has a specific focus. These are the consensus theory (also known as the will theory); the declaration theory; and the confidence theory (also known as the reliance theory).<sup>67</sup>

- The consensus or will theory, focuses on the fact that parties must be unanimous in their intention regarding the agreement.<sup>68</sup> They must agree on all aspects of the agreement and must be aware that they have agreed

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<sup>64</sup> De Wet & Van Wyk *Kontraktereg* 9, 130; Du Bois et al *Wille's Principles* 737; Sharrock *Business Transactions* 54, 75; Bradfield *Christie's Law of Contract* 29-30; Van Huyssteen et al *Contract* 20, 23. There are two distinct forms of consensus: namely actual consensus between the parties, and, ostensible consensus, which means that there is no actual consensus but the law recognises contractual liability. See the discussion by Sharrock of immaterial dissensus and reasonable reliance in *Business Transactions* 75-83, 88.

<sup>65</sup> Zulman & Dicks *Norman's Purchase and Sale* 55-56; Bradfield *Christie's Law of Contract* 23.

<sup>66</sup> Hutchison et al *Law of Contract* 7. For purposes of this thesis, I will focus on contracts with commercial consequences, as s 14 of the CPA provides for agreements with commercial consequences. Note that economic value is not a requirement for all types of agreement, for example, an agreement to donate does not require *quid pro quo* consideration or reciprocity, but is still a valid and binding agreement in South Africa. However, commercial agreements like purchase and sale, and leases require economic value and reciprocity to be valid, as these form part of the *essentialia* of the specific type of agreement. Economic value in this sense differs from the doctrine of consideration, as the doctrine of consideration is a doctrine of English origin, and English law does not acknowledge or enforce promises (or, for example, the donation agreement referred to above). Only agreements with a *quid pro quo* are acknowledged in English law. See Bradfield *Christie's Law of Contract* 9. See Van Jaarsveld & Oosthuizen *Handelsreg* 25 on contractual obligations with commercial consequences. The English doctrine of consideration, which relates to the *iusta causa* of the contract, no longer forms part of the South African law of contract. For a full discussion on this aspect see Bradfield *Christie's Law of Contract* 9-11; Hutchison et al *Law of Contract* 12.

<sup>67</sup> De Wet & Van Wyk *Kontraktereg* 16; Hutchison et al *Law of Contract* 15-16; Van Huyssteen et al *Contract* 21-33; Pretorius (2004) *THRHR* 383-393, 550-565. There are further theories, subdivisions, and refinements of these theories, but these three theories will suffice for the purposes and scope of this thesis.

<sup>68</sup> Van Huyssteen et al *Contract* 22; De Wet & Van Wyk *Kontraktereg* 9; Hutchison et al *Law of Contract* 13-14; Bradfield *Christie's Law of Contract* 29-30; Sharrock *Business Transactions* 75.

on these aspects.<sup>69</sup> Opponents of this theory are of the view that if applied consistently this theory could lead to unacceptable results.<sup>70</sup>

- The focus of the declaration theory is the corresponding declarations of intent by the parties to an agreement.<sup>71</sup> Therefore, the declaration theory should not necessarily be regarded as acting in opposition to the consensus theory, but rather as a qualified form of the consensus theory. This theory can be criticised on the ground that the parties may declare one thing but intend or understand something different.<sup>72</sup>
- The third theory, the confidence or reliance theory, is based on the confidence or belief which the declaration by one of the parties instills in the other.<sup>73</sup> This theory can also be criticised in that the confidence instilled by a party may indeed be misplaced. The supporters of this theory qualify it further by stating that the confidence instilled should be reasonable, thereby adding an objective element.<sup>74</sup>

It is clear from the above analysis that the differences between these theories are subtle, academic, and largely artificial. They can and do overlap, are directly or

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<sup>69</sup> Sharrock *Business Transactions* 54, 75; Bradfield *Christie's Law of Contract* 30, 32; De Wet & Van Wyk *Kontraktereg* 9-12.

<sup>70</sup> An example is that of a person who is under the impression that his or her car has been stolen and as a result enters into an agreement to purchase a new car. Although this misconception leads to the conclusion of a car-purchase agreement, it does not affect the intention of the parties to the agreement. Other instances of errors or mistakes can include a party to an agreement not expressing himself clearly, making a spelling error which leads to a misconception, a message sent to an incorrect person, or mistaken identity. In all of these circumstances, one or both of the parties is of the opinion that they have consensus, while clearly there is error in one or both instances. See par 3.2.4.2 for a discussion of material errors, and par 3.2.4.3 for a discussion of non-material errors. Related to this is *reservatio mentalis* (inner reserve or mental reservation) where a party leads the other to believe that he or she wants to do something, while in fact, he or she does not. See Hiemstra & Gonin *Drietalige Regswoordeboek* 280; Van Huyssteen et al *Contract* 31; De Wet & Van Wyk *Kontraktereg* 9 11 26; Hutchison et al *Law of Contract* 14.

<sup>71</sup> The declaration can be written or oral, provided that the intention is communicated to the other party. De Wet & Van Wyk *Kontraktereg* 12; Van Huyssteen et al *Contract* 34; *Saambou v Friedman* 1979 (3) SA 978 (A) 994; *SA Railway and Harbours v National Bank* 1924 AD 704 715-716.

<sup>72</sup> The declaration theory is based on an objective approach to the basis of a contract and is regarded as controversial by some writers. See Hutchison et al *Law of Contract* 91. There is difference of opinion as to whether the declaration theory was formally recognised by Wessels JA in *South African Railways and Harbours v National Bank of South Africa Ltd* 1924 AD 704, 715-716, although the theory was applied by the Supreme Court of Appeal in *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A). Pretorius notes in *Hutchison et al Law of Contract* 98-107 that a more acceptable version of the declaration theory could be to use it in conjunction with the *iustus error* doctrine thereby establishing a generally objective approach. For a contrary view see Bradfield *Christie's Law of Contract* 1, 25 and Van Huyssteen et al *Contract* 21-22.

<sup>73</sup> The confidence or reliance theory was accepted in South African law in the decision in *I Pieters & Company v Salomon* 1911 AD 121, 137 in the judgment by Innes JA. It was confirmed in subsequent decisions, eg, *Hodgson Bros v South African Railways* 1928 CPD 257; *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* 1983 (1) SA 978 (A); *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1983 (1) SA 978 (A) 984; Hutchison et al *Law of Contract* 17-19.

<sup>74</sup> De Wet & Van Wyk *Kontraktereg* 14; Van Huyssteen et al *Contract* 35-42; *Constantia Insurance Company Ltd v Compusource (Pty) Ltd* 2005 (4) 345 (A) 355-356.

indirectly linked, and can give rise to confusion in practice.<sup>75</sup> Pretorius argues that South African contract law is a fusion of various principles and theories that together form the foundation of contractual liability.<sup>76</sup>

To summarise, the common law regards the consensus theory as the basis for contractual liability,<sup>77</sup> although it is not without limitations.<sup>78</sup> Consensus consists of three elements:

- consensus as to the consequences of the agreement;
- the parties must have the *animus contrahendi*;<sup>79</sup> and
- the parties must be aware of the existence of the agreement.<sup>80</sup>

Consensus on the consequences of the agreement means that the parties must be unanimous as to the obligations created by the agreement. If there is not a meeting of minds on the specific type of obligation created, or on the parties involved in the agreement, or on the type of agreement or legal tie created by the agreement, there is no consensus to enter into an agreement.<sup>81</sup>

The requirement of *animus contrahendi* is the basis of the agreement as a contract can only come into being when parties intend it to have legal consequences. Therefore, an offer to go for a walk, or an offer clearly made as a joke, will not have

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<sup>75</sup> In addition to these theories, the doctrine of estoppel is relevant in instances where party A made a misrepresentation, party B relied and acted on that misrepresentation and entered into an agreement and suffered prejudice because of the reasonable impression created by A. See De Wet LLD 16; Cilliers & Benade et al *Corporate Law* 193; Oosthuizen (1979) *TSAR* 9-10; Bradfield *Christie's Law of Contract* 35 who criticises prejudice as a requirement 35; Van Huyssteen et al *Contract* 33; Sonnekus *Estoppel* 2-3. Should A try to escape liability in terms of the agreement, relying on his own misrepresentation, estoppel prevents him from doing so on the basis of the Roman law maxim *obstringitur ne in suum factum veniat* which means, 'he is prevented from going against his own act'. Hiemstra & Gonin *Drietalige Regswoordeboek* 247; Van Huyssteen et al *Contract* 33. De Wet discusses the possibility that estoppel is an extended application of the *exceptio doli* in his LLD thesis, De Wet LLD 84-89. He concludes that estoppel is not a form of the *exceptio doli*, as the *exceptio* is the basis of liability for damages caused by malicious misrepresentation, but is not wide enough to cover all instances of estoppel. Estoppel is not a cause of action, but only a defence to either a claim or a counterclaim. See Sonnekus *Estoppel* 30-34; *Low v Boverie* 1891 3 Ch 82 [1891-1894] AD, ER 348; De Wet LLD 16,30; see the Constitutional Court case of *Vodacom (Pty) Ltd v Makate* 2016 (4) SA 121 (CC) where this aspect and the difference between ostensible authority and estoppel is discussed in detail. To summarise: estoppel is a defence available to a *bona fide* party, who has been misled by the misrepresentation of the other party, when held liable by the other party. However, estoppel should not regularly be encountered in fixed-term consumer agreements as it is more generally a defence in corporate law matters where representation and the authority of company representatives are at stake.

<sup>76</sup> Pretorius (2006) *THRHR* 97, 120-121.

<sup>77</sup> Van Huyssteen et al *Contract* 22; Bradfield *Christie's Law of Contract* 32.

<sup>78</sup> Van Huyssteen et al *Contract* 32-33; Hutchison et al *Law of Contract* 15; De Wet & Van Wyk *Kontraktereg* 15.

<sup>79</sup> The intention to contract and be legally bound thereby, Hiemstra & Gonin *Drietalige Regswoordeboek* 157.

<sup>80</sup> Van Huyssteen et al *Contract* 23; Hutchison et al *Law of Contract* 13-14.

<sup>81</sup> There is only one exception, when parties would have concluded the agreement despite the error in question.

legal consequences; neither will contracts containing an element of misrepresentation or so-called simulated contracts.<sup>82</sup>

The final requirement for consensus listed above – awareness of the agreement – sounds obvious, but if all concerned parties are not aware that they have in fact reached consensus and that the contract has come into existence, there is no valid agreement. To reach a level of agreement sufficient to create a contract this awareness must be effectively communicated to each party and be reciprocal.<sup>83</sup>

Several types of error may lead to parties not reaching consensus on an agreement or its *essentialia*. De Wet argues that neither Roman nor Roman-Dutch scholars were absolutely clear on what constituted an error and on when errors affected the validity of contracts.<sup>84</sup>

In South African law, errors are divided into material and non-material errors and I turn now to a further examination of error and how it can affect a contract.<sup>85</sup>

#### 3.2.4.2 *Material errors*

Material errors affect consensus and can therefore be used as a valid defence by the party in error.

##### 3.2.4.2.1 *Iustus error*<sup>86</sup>

*Iustus error* implies a reasonable mistake. This defence aims to protect a party entering into an agreement based on a reasonable and material mistake for which he or she is not to blame.<sup>87</sup> An example of a *iustus error* is where the purchaser is reasonably mistaken regarding an essential aspect of the agreement.<sup>88</sup>

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<sup>82</sup> Van Huyssteen et al *Contract* 24; this principle is based on the *plus valet agitur quam quod simulate concipitur* maxim. This means that the real intention of the parties carries more weight than a fraudulent or simulated formulation thereof, Hiemstra & Gonin *Drietalige Regswoordeboek* 256; Van Huyssteen et al *Contract* 24; Zulman & Dicks *Norman's Purchase and Sale* 6-7; *Zandberg v van Zyl* 1910 AD 302; Van Jaarsveld & Oosthuizen *Handelsreg* 24; Du Bois et al *Wille's Principles* 805-806.

<sup>83</sup> Van Huyssteen et al *Contract* 25 49; Van Jaarsveld & Oosthuizen *Handelsreg* 26; De Wet & Van Wyk *Kontraktereg* 31-32; Sharrock *Business Transactions* 54.

<sup>84</sup> De Wet & Van Wyk *Kontraktereg* 18-19.

<sup>85</sup> De Wet & Van Wyk *Kontraktereg* 17-31; Du Bois et al *Wille's Principles* 746-750; Van Huyssteen et al *Contract* 82-90; Bradfield *Christie's Law of Contract* 365.

<sup>86</sup> Meaning reasonable error Hiemstra & Gonin *Drietalige Regswoordeboek* 218; Bradfield describes it as an error of which 'the law will take notice', Bradfield *Christie's Law of Contract* 365.

<sup>87</sup> Hutchison et al *Law of Contract* 99-102; Van Jaarsveld & Oosthuizen *Handelsreg* 48-50; Bradfield *Christie's Law of Contract* 367 contends that this type of error will not occur frequently in practice, as demonstrated in case law. See too *Fairmead, National and Overseas Distributors Corp (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A).

<sup>88</sup> A classic example of this is the judgment of *Maritz v Pratley* (1894) 11 SC 345 346 where the purchaser at an auction was under the impression that he was purchasing a mantelpiece and the mirror displayed thereon, while in fact only the mantelpiece was part of the lot he bid on. This was held to be a reasonable mistake.

#### 3.2.4.2.2 *Error in corpore*<sup>89</sup>

*Error in corpore* normally relates to the *res vendita*.<sup>90</sup> For example, when a person purchases a tablet device, specifically requiring one that can also be used to make phone calls, but the tablet does not comply with this requirement despite assurances by the seller. This error will be material as there clearly was no consensus in respect of the *merx* and its qualities. The purchaser is not able to use the tablet for the intended purpose.

#### 3.2.4.2.3 *Error in negotio*<sup>91</sup>

*Error in negotio* occurs when the parties are not *ad idem* on the legal nature of the agreement they are concluding. For instance, A is under the impression that he is purchasing a cell phone by paying instalments over a period of 24 months, while he is in fact renting the cell phone for a period of 24 months. This error affects consensus, which is essential to the agreement, as A will not become the owner of the phone on termination of the agreement.<sup>92</sup>

#### 3.2.4.2.4 *Error in substantia sive materia*<sup>93</sup>

*Error in substantia sive materia* relates to the attributes or characteristics of the *merx*. The error must relate to an essential characteristic of the *merx* to be classified as a material mistake. This error is discussed in the *Digesta* where a few examples, such as buying vinegar instead of wine, bronze for gold, or buying lead instead of silver, are mentioned.<sup>94</sup> Some writers argue that an *error in substantia* is not a material error.<sup>95</sup> If a purchaser is under the impression that he or she is purchasing gold, and is in fact sold bronze, this clearly is a material error as it affects consensus.<sup>96</sup> An example relevant to fixed-term contracts is if a consumer purchases a waterproof cell phone. When he or she uses it to take underwater photographs, the cell phone stops working and is permanently damaged. The

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<sup>89</sup> Error regarding the type of the *merx*, Hiemstra & Gonin *Drietalige Regswoordeboek* 183; Van Jaarsveld & Oosthuizen *Handelsreg* 45; Van Huyssteen et al *Contract* 27.

<sup>90</sup> Thing purchased, Van Jaarsveld & Oosthuizen *Handelsreg* 45; *Heatlie v Union Government* 1887 SC 351.

<sup>91</sup> Error regarding the nature of the agreement or juridical act, Hiemstra & Gonin *Drietalige Regswoordeboek* 183 and 234; Hutchison et al *Law of Contract* 88; Van Jaarsveld & Oosthuizen *Handelsreg* 41; Van Huyssteen et al *Contract* 27.

<sup>92</sup> Hutchison et al *Law of Contract* 90.

<sup>93</sup> Error regarding an essential quality of the thing sold, Hiemstra & Gonin *Drietalige Regswoordeboek* 183.

<sup>94</sup> *Digesta* 18.1.9.2 ‘... *ut puta si acetum pro vino veneat, aes pro auro vel plumbum pro argento...*’ available at <http://legalhistorysources.com/Law508/Roman%20Law/JustinianDigest.htm> (date of use: 4 November 2019); Zulman & Dicks *Norman’s Purchase and Sale* 57-58; Van Jaarsveld & Oosthuizen *Handelsreg* 45-46; *Trollip v Jordaan* 1961 (1) SA 238.

<sup>95</sup> Hutchison et al *Law of Contract* 90.

<sup>96</sup> Zulman & Dicks *Norman’s Purchase and Sale* 57-58; *Trollip v Jordaan* 1961 (1) SA 238.

purchaser will not be able to use his or her purchase for its intended purpose as there was an error regarding its physical attributes.

### 3.2.4.3 Non-material errors

Non-material errors do not affect the essential aspects of the agreement, as there is consensus between the parties on the *essentialia* of the agreement. For example, a very specific aspect of the performance of the *merx*,<sup>97</sup> the specific details of obligations in terms of the agreement, or the identity of the parties. These errors include mistakes such as when the seller simply calculates the purchase price incorrectly by making a slight counting mistake,<sup>98</sup> or when a purchaser thinks his or her cell phone is irreparably broken, buys a new phone, and then discovers that the original cell phone was not broken but that the battery was faulty. In some instances, the difference between material and non-material errors is subtle,<sup>99</sup> and not all errors relating to the performance of the *merx* or the parties are material errors.<sup>100</sup>

A few instances of non-material errors are:

- *Error in nomine*<sup>101</sup> which is an error regarding the name of a party.
- *Error in persona*,<sup>102</sup> which is an error regarding the contracting parties.
- *Error iuris*,<sup>103</sup> which is an error regarding the law.

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<sup>97</sup> For instance, a car only reaching a speed of 180 km/h instead of the 185 km/h as presented by the car dealer, but being effective and in perfect working order in every other way.

<sup>98</sup> For instance, where the purchaser buys 85 sheets of paper and the seller counts 86 sheets of paper by mistake.

<sup>99</sup> *Trollip v Jordaan* 1961 (1) SA 238 (A); *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D). The *Allen v Stirling* decision was confirmed in *Brink*.

<sup>100</sup> Van Huyssteen et al *Contract* 26; Hutchison et al *Law of Contract* 89-90; *Trust Bank of Africa Ltd v Frysich* 1977 (3) SA 562D. For the test for *iustus error* see *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) 479 [G-H]; *Van Aartsen v Van Aartsen* 2006 (4) SA 131 (T) paras [17]–[19], [22]–[23].

<sup>101</sup> *Cassell's Latin Dictionary* 218, 395, this differs from the *error in persona*. Here is no consensus regarding the specific name of one of the parties, eg, when the seller thinks he or she is contracting with John Smith, and he or she is in fact contracting with Jan Schmidt. This error does not affect the essence of the agreement, and will not be a valid defence in a contract under the common law or in a fixed-term agreement; error regarding the name *Cassell's Latin Dictionary* 218, 395; Van Jaarsveld & Oosthuizen *Handelsreg* 45.

<sup>102</sup> Hiemstra & Gonin *Drietalige Regswoordeboek* 183; Van Huyssteen et al *Contract* 27; *error in persona* is an error regarding the identity of one or both parties, where the identity of such party is essential to the nature or the agreement. See Hutchison et al *Law of Contract* 90; an example is when the owner of a racehorse enters into a training agreement with a well-known experienced and successful trainer and the trainer is in fact someone else, not the experienced and proven successful racehorse trainer.

<sup>103</sup> Error regarding the law or the legal position, Hiemstra & Gonin *Drietalige Regswoordeboek* 183 – generally this error is not material, see Hutchison et al *Law of Contract* 90. For example, where a party was under the impression that a specific agreement had to be in writing when, in fact, it was not a legal requirement for the agreement to be in writing.

#### 3.2.4.4 Concluding remarks: Consensus and error

Parties must be *ad idem* on the consequences of the agreement they conclude, they must have *animus contrahendi*, or the serious intention to be bound by the agreement, and they must be aware of the existence of the agreement. In addition, there should be no material errors that affect consensus, for example, an error as to the essential characteristics of the goods in respect of a sales agreement.

#### 3.2.5 *Justa causa*<sup>104</sup>

A prerequisite for the existence of all contracts is a *causa* or *justa causa*.<sup>105</sup> This means that there must be a valid and legal reason for entering into the contract as an agreement which is *contra bonos mores*<sup>106</sup> is unenforceable.<sup>107</sup> Examples of *causae* for purposes of this thesis, are the purchase of a cell phone combined with a service agreement to provide airtime and mobile data, and a lease agreement.<sup>108</sup>

#### 3.2.6 *Lawfulness*

An unlawful agreement is void.<sup>109</sup> It is therefore important to establish the lawfulness of all agreements, whether concluded in terms of the common law or under the CPA. An agreement is unlawful if it is illegal in terms of either legislation or the common law, or if it is *contra bonos mores*.<sup>110</sup> Interestingly, even a contract that *prima facie* appears to be lawful – eg, a regular lease agreement – may in fact prove to be unlawful – eg, the lease of premises for the manufacture of cocaine.<sup>111</sup> This principle is based on the Roman law maxim *ex turpi causa non oritur actio*.<sup>112</sup> Watermeyer AJP criticised the maxim in *Kennedy v Steenkamp*<sup>113</sup> as being too restrictive to provide a conclusive and comprehensive test to establish the enforceability of

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<sup>104</sup> Meaning lawful reason, Hiemstra & Gonin *Drietalige Regswoordeboek* 218.

<sup>105</sup> Van Zyl *Geskiedenis* 138, 144, 169; *iusta causa* is a lawful ground or reason for entering into the agreement, Hiemstra & Gonin *Drietalige Regswoordeboek* 218 (hereafter *causa* or *cause*).

<sup>106</sup> The phrase means against good morals, Hiemstra & Gonin *Drietalige Regswoordeboek* 169.

<sup>107</sup> Van Zyl *Geskiedenis* 253. See *Brisley* para [93] on the possibilities for misinterpretation of the *boni mores*, and Cameron AJ who recommends rather referring to the Constitution for guidance on an 'objective value system'.

<sup>108</sup> A *causa* is not consideration, and should not be confused with the consideration theory which does not form part of our law. See *Rood v Wallach* 1904 TS 187, 201; *Conradie* 289, 320.

<sup>109</sup> De Wet & Van Wyk *Kontraktereg* 89; Bradfield *Christie's Law of Contract* 446; *Colonial Banking and Trust Co Ltd v Hill's Trustee* 1927 AD 488; *Tannenbaum's Executors and Tannenbaum v Quakley and the Liquidator of Varachia Store (Pty) Ltd* 1940 WLD 209, 230; *Cape Dairy & General Livestock Auctioneers v Sim* 1924 AD 167, 170; *Cameron v Bray Gibb & Co (Pvt) Ltd* 1966 (3) SA 675 (R) 676-677 (hereafter *Cameron*); Bradfield *Christie's Law of Contract* 401; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 7-9.

<sup>110</sup> Meaning against good morals, Hiemstra & Gonin *Drietalige Regswoordeboek* 169.

<sup>111</sup> For a general discussion of the principle see *Kennedy v Steenkamp* 1936 CPD 113, 116-118; De Wet & Van Wyk *Kontraktereg* 90; Bradfield *Christie's Law of Contract* 414-415.

<sup>112</sup> No action arises from an immoral or illegal cause, Hiemstra & Gonin *Drietalige Regswoordeboek* 186.

<sup>113</sup> 1936 CPD 113 (hereafter *Kennedy*).



agreements.<sup>114</sup> He argued that Grotius clearly explained the difference between unlawfulness in the *causa* itself, unlawfulness in the contract, and unlawfulness in the aim or purpose of the agreement.<sup>115</sup> Therefore, if the agreement, or certain of its clauses, are unlawful the transaction can either not be enforced,<sup>116</sup> or the unlawful clause or part of the agreement becomes severable,<sup>117</sup> depending on circumstances.<sup>118</sup> An example of such an agreement relevant to fixed-term agreements is when a consumer, who is an illegal immigrant, enters into a cell phone agreement with a supplier and provides falsified information and documentation to satisfy the provisions of the Financial Intelligence Centre Act.<sup>119</sup> This agreement will not be lawful, and as a result would be unenforceable.

### 3.2.7 Possibility of performance

For any agreement to be valid and binding, whether concluded in terms of the common law or under section 14 of the CPA, performance must be possible.<sup>120</sup> This principle stems from Roman law, was incorporated into Roman-Dutch law, and is still valid today.<sup>121</sup> Bradfield identifies four requirements for impossibility of performance.<sup>122</sup> First, the performance must be impossible not merely improbable. The performance must be entirely impossible not only relatively impossible. The impossibility must not be the fault of either party.<sup>123</sup> Finally, it must be the common intention of both parties that impossibility will lead to the contract being void.<sup>124</sup> An example of this is when a consumer leases a property and after conclusion of the agreement, but before the lessee takes occupation, the property is destroyed by runaway veld fires which cannot be attributed to the actions of either of the parties to the lease.

Our law distinguishes between initial impossibility of performance and supervening impossibility.<sup>125</sup> Not only is the impossible performance not due, but the counter-

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<sup>114</sup> Kennedy 117.

<sup>115</sup> Kennedy 117.

<sup>116</sup> Kennedy 118; Bradfield *Christie's Law of Contract* 454-458.

<sup>117</sup> Bradfield *Christie's Law of Contract* 448-454; *Eastwood v Shepstone* 1902 TS 294, 303-305; Sharrock *Business Transactions* 195-196.

<sup>118</sup> It is difficult to lay down a hard and fast rule for when this will be the case. See Bradfield *Christie's Law of Contract* 451-454; *Cameron* 676-677; *Smith v Rand Bank Bpk* 1979 (4) SA 228 (N) 233; *Vogel v Volkersz* 1977 (1) SA 537 (T) 548F; *Kuhn v Karp* 1948 (4) SA 825 (T) 838-840; Bradfield *Christie's Law of Contract* 401-407. Note that severance in respect of restraint of trade clauses will not be dealt with as that falls outside the scope of this thesis.

<sup>119</sup> Act 38 of 2001.

<sup>120</sup> De Wet & Van Wyk *Kontraktereg* 85; Bradfield *Christie's Law of Contract* 109-110.

<sup>121</sup> De Wet & Van Wyk *Kontraktereg* 84-85; Bradfield *Christie's Law of Contract* 109; *Peters, Flamman & Co v Kokstad Municipality* 1919 AD 427 434; *Merrill Lynch SA (Pty) Ltd v Moosa* [2003] All SA 431 (C) para [20].

<sup>122</sup> Bradfield *Christie's Law of Contract* 109-110.

<sup>123</sup> *Van der Westhuizen v James* 1898 5 Off Rep 90, 90-91 (hereafter *James*).

<sup>124</sup> A court will look at the circumstances and the contract itself to establish this.

<sup>125</sup> Bradfield *Christie's Law of Contract* 109-112, 620-621.

performance is also not due or enforceable.<sup>126</sup> It is important to note the performance of the contract must be impossible, not the objectives resulting from the contract,<sup>127</sup> for example, if the *res vendita*<sup>128</sup> does not exist.<sup>129</sup> Impossibility of performance must be objective, otherwise, the contract will commence.<sup>130</sup>

The effect of impossibility differs depending on the circumstances.<sup>131</sup> If a party warranted the possibility of performance, the warrantor will be liable for breach of contract.<sup>132</sup> If a party has incurred expenses based on his or her belief in the possibility of performance, he or she may be compensated for his or her loss depending on circumstances.<sup>133</sup>

### 3.2.8 Formalities<sup>134</sup>

Common law does not prescribe formalities for the conclusion of an agreement,<sup>135</sup> neither are they generally a legislative requirement.<sup>136</sup> However, parties to an agreement can agree on formalities – eg, that the contract and any amendments thereto must be in writing.<sup>137</sup> Section 14 of the CPA which regulates fixed-term contracts, by implication requires fixed-term agreements to be in writing.<sup>138</sup>

Formalities serve a protective function to ensure a true record of the agreement reached between the parties so preventing litigation based on incorrectly remembered terms or even fraudulent allegations regarding the terms agreed to.<sup>139</sup> When formalities are prescribed by statute but not adhered to, the position is

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<sup>126</sup> De Wet & Van Wyk *Kontraktereg* 85.

<sup>127</sup> Bradfield *Christie's Law of Contract* 109 n 677; *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd* [2003] All SA 471 (W) para [64].

<sup>128</sup> The thing bought or sold. Hiemstra & Gonin *Drietalige Regswoordeboek* 426.

<sup>129</sup> *James* 91-92.

<sup>130</sup> De Wet & Van Wyk *Kontraktereg* 85; Van Huyssteen et al *Contract* 183.

<sup>131</sup> Van Huyssteen et al *Contract* 184-185.

<sup>132</sup> Note that this claim will be delictual not contractual. See Van Huyssteen et al *Contract* 185.

<sup>133</sup> *James* 91-92.

<sup>134</sup> The requirements set by s 14 of the CPA for fixed-term contracts are discussed in Ch 4. This discussion relates to general principles that may be relevant.

<sup>135</sup> De Wet & Van Wyk *Kontraktereg* 83; Zulman & Dicks *Norman's Purchase and Sale* 71; Van Huyssteen et al *Contract* 146.

<sup>136</sup> Van Huyssteen et al *Contract* 146, 156-158; Bradfield *Christie's Law of Contract* 129-131; Du Bois et al *Wille's Principles* 755. There are exceptions, eg, the Alienation of Land Act 68 of 1981 in respect of alienation of land; s 6 of the General Law Amendment Act 50 of 1966 in respect of suretyships; and the National Credit Act 34 of 2005 in respect of credit agreements.

<sup>137</sup> Van Huyssteen et al *Contract* 147-148; *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A) 766.

<sup>138</sup> Section 14 of the CPA, read with reg 5(1). The duration of the agreement is calculated from date of signature by the consumer, which implies a written agreement. Because s 14 of the CPA fixed-term contracts are by implication required to be in writing, and suppliers use standard-form contracts — many common-law doctrines like quasi-mutual assent are not relevant to this thesis, and will not be discussed.

<sup>139</sup> Bradfield *Christie's Law of Contract* 129; Van Huyssteen et al *Contract* 161; Du Bois et al *Wille's Principles* 755-756; Hutchison et al *Law of Contract* 159-160.

regulated by the particular statute. As a rule, non-adherence to a statutory requirement results in a void agreement.<sup>140</sup>

When an agreement is in writing, the parol evidence rule applies,<sup>141</sup> and because of the importance of the rule, especially for the consumer who is generally in an inferior bargaining position, further explanation is required.

### 3.2.9 Parol evidence rule<sup>142</sup>

The parol evidence rule applies to written common-law contracts and fixed-term contracts under section 14 of the CPA.<sup>143</sup> Originating in English law, the rule entails that when parties enter into a written contract, the original document with its written amendments, additions, or alterations, represents the only source of the terms and conditions of the agreement.<sup>144</sup> In general, no extrinsic evidence may be led to alter the written agreement as the purpose of requiring writing is to ensure legal and factual certainty regarding the terms and conditions of the agreement.<sup>145</sup> Certain exceptions – eg, memoranda, local commercial practice, invalid juristic acts, simulated contracts, collateral agreements,<sup>146</sup> later amendments to agreements, suspensive conditions, and additional parties to the agreement – have been allowed by courts.<sup>147</sup> The parol evidence rule does not apply if its application would be to the detriment of *bona fide* third parties.<sup>148</sup>

Courts have permitted evidence in certain circumstances.<sup>149</sup> The purpose of the parol evidence rule is to prevent uncertainty regarding the content of written

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<sup>140</sup> For instance, s 28 of the Alienation of Land Act 68 of 1981.

<sup>141</sup> De Wet & Van Wyk *Kontraktereg* 84; Van Huyssteen et al *Contract* 167.

<sup>142</sup> Also known as the integration rule or the golden rule, Du Bois et al *Wille's Principles* 806. A full discussion of parol evidence falls outside the scope of this thesis.

<sup>143</sup> Section 14 read with reg 5(1). In certain circumstances, the parol evidence rule is limited or abolished by sections of the CPA, eg, s 52(2). See Ch 4 para 4.3.2.7.

<sup>144</sup> Du Bois et al *Wille's Principles* 807; Van Jaarsveld & Oosthuizen *Handelsreg* 111; Van Huyssteen et al *Contract* 167; Bradfield *Christie's Law of Contract* 226.

<sup>145</sup> Du Bois et al *Wille's Principles* 807; De Wet & Van Wyk *Kontraktereg* 84; Van Jaarsveld & Oosthuizen *Handelsreg* 111; Hutchison et al *Law of Contract* 257-258; Lowrey v Steedman 1914 AD 532, 543; Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd 1941 AD 43, 47; Meyer v Merchants Trust Ltd 1942 AD 244, 253; Harlin Properties v Los Angeles Hotel 1962 (3) SA 143 (A); Venter v Birchholtz 1972 (1) SA 276 (A) 282; Strydom v Coach Motors 1975 (4) SA 838 (T); National Board (Pretoria) (Pty) Ltd v Estate Swanepoel 1975 (3) SA 16 (A) 25; Reilly v Seligson and Clare Ltd 1977 (1) SA 626 (A) 637; Johnson v Leal 1980 (3) SA 927 (A) 938, 943. Also see the case discussion by Cornelius (2009) TSAR 775.

<sup>146</sup> Bradfield *Christie's Law of Contract* 233; Du Plessis v Nel 1952 (1) SA 513 (A) 519-520, 529, 530.

<sup>147</sup> Bekker (2014) PELJ 1141-1142.

<sup>148</sup> Van Huyssteen et al *Contract* 179.

<sup>149</sup> Where the evidence will not modify or vary the terms of the agreement; when the dispute relates to the existence or validity of the agreement; to explain the terms used in the agreement; where collateral agreements are not inconsistent with the main agreement; in connection with an oral agreement after the written agreement was completed; when the parties want to establish what their respective rights and obligations are in terms of the agreement; where the evidence relates to

agreements, and to regulate the type and degree of evidence allowed in suitable circumstances.<sup>150</sup> However, rectification of contracts is allowed to mitigate the harsh and unfair application of the parol evidence rule where the written agreement does not reflect the true intention of the parties because of a mutual error or mistake.<sup>151</sup> The consequences of rectification are that after rectification the agreement reflects the true intention of the parties.<sup>152</sup>

Scholars, judges, and practitioners have for decades grappled with the interpretation, extent, application, and components of the parol evidence rule. One school of thought advocates the abolition of the rule, while another proposes a virtually unlimited discretion for courts to hear any evidence to clarify and determine the exact intention of parties to an agreement.<sup>153</sup>

In the important case of *KPMG Chartered Accountants (SA) v Securefin Ltd*<sup>154</sup> the court held that the parol evidence rule still forms part of our law. It reiterated that practitioners do not often resort to the rule and courts often fail to enforce it.<sup>155</sup> Harms AJ expressly stated the interpretation of a written document is a legal matter, not a

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a prior oral agreement that stipulates when the written agreement becomes effective. See Du Bois et al *Wille's Principles* 807-809; Van Huyssteen et al *Contract* 170; *Peter v Thomas* (1908) EDC 140; *Avis v Verseput* 1943 AD 331.

<sup>150</sup> Van Huyssteen et al *Contract* 167. The rule is divided into two principles; namely, the integration rule and the interpretation rule. The integration rule forms the essence of the parol evidence rule and regulates if, and to what degree extrinsic evidence may be led to alter, amend or contradict the terms of the written agreement. Therefore, this rule speaks to the body or contents of the agreement, and forms the first leg of the rule. The interpretation rule, on the other hand, guides as to the degree of extrinsic evidence and the circumstances when evidence may be brought to construe or interpret the words or terms already in the written agreement. Another rule, closely related to the parol evidence rule prohibits extrinsic evidence to alter or amend clear and unambiguous words and provisions in an agreement, see Cornelius (2009) *TSAR* 768; Van Huyssteen et al *Contract* 168. See the *Delmas Milling Co Ltd v du Plessis* 1955 3 SA 447 (A) judgment that was fundamental in the development of the parol evidence rule, as it set three rules for the admission of parol evidence. For a discussion of this judgment and the *Coopers & Lybrand v Bryant* 1995 3 SA 761 (A) judgment, see Cornelius (2009) *TSAR* 770-771 where he discusses these two judgments and their effect on the development of the rule. These terms and similar remedies obviously lead to confusion, Van Huyssteen et al *Contract* 168; Bekker (2013) *Litnet Akademies* 111-151; Bradfield *Christie's Law of Contract* 240.

<sup>151</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 111-112; Van Huyssteen et al *Contract* 172; Bekker (2014) *PELJ* 1142; Bradfield *Christie's Law of Contract* 384-390. There are strict requirements for the allegations in pleadings when a party wishes to make use of rectification. See *Strydom v Coach Motors* 1975 (4) SA 838 (T) 840-841.

<sup>152</sup> In *Akasia Road Surfacing v Shoredits Holdings* 2002 (3) SA 346 (SCA) paras [16]–[17] the court held that vagueness in the agreement, although it affected the validity of the rectified agreement, did not prevent the defendant from applying to court to have the agreement rectified.

<sup>153</sup> Bekker *LLD* 530-532 proposes that courts should be able to consider any kind of evidence to decide disputes in pleadings. Courts should hold the wording and terminology in agreements in high regard – especially where the wording is clear and unambiguous. He concludes that courts should have an unlimited discretion to determine the true intention of parties to an agreement. Note that the CPA and agreements in terms of the CPA are interpreted in accordance with the provisions of s 4 thereof. This aspect is dealt with in Ch 4 para 4.2.3.3.

<sup>154</sup> [2009] 2 All SA 523 (SCA) (hereafter *KPMG*).

<sup>155</sup> *KPMG* para [39].

factual matter and, therefore, only the court can interpret the agreement,<sup>156</sup> and that the normal rules of evidence apply.<sup>157</sup>

Over the years, courts have become more liberal in their approach to and application of the parol evidence rule, and have elected not to distinguish between surrounding circumstances and background circumstances.<sup>158</sup> However, they remain justifiably cautious of allowing external evidence in interpreting the meaning of clauses in contracts,<sup>159</sup> and the parol evidence rule still applies.

Sections 4(3) and 4(4) of the CPA provide how a court or the tribunal should interpret provisions of the CPA, and standard forms, contracts, and other documents prepared or published by suppliers. However, as common-law rights are preserved in section 2(10) of the CPA, the common-law principles of the parol evidence rule remain relevant.<sup>160</sup>

In the following paragraph, I move on to discuss the duration of contracts as this is a pertinent aspect of this thesis.

### 3.2.10 Duration of agreement

Although a stipulation on the duration of the contract is not an essential element of the agreement, it is usual and advisable to agree on the duration of the agreement. If the agreement is valid for a certain, determinable period it is referred to as a fixed-term agreement.<sup>161</sup> If not, it could be an *ad hoc* agreement or even an indefinite

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<sup>156</sup> *KPMG* para [39].

<sup>157</sup> *KPMG* para [39]. In his discussion of the *KPMG* case, Cornelius observes contractual evidence can be divided into four categories: (i) Evidence about the circumstances at the time of negotiation and conclusion of the agreement, which is admissible; (ii) evidence regarding what one of the parties detected at the time of conclusion of the agreement, which is generally not admissible, except to establish to what extent consensus exists; (iii) evidence on the parties' collective intention whilst negotiations were taking place, which is admissible after *KPMG*; (iv) evidence of the background conditions that demonstrates the parties' respective intentions or quasi mutual consensus during negotiations and conclusion of the agreement, which is generally not allowed, although this could be relevant to establish if, and to what extent, there was consensus on the matter. See Cornelius (2009) *TSAR* 774-775.

<sup>158</sup> *KPMG* para [39]; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para [12].

<sup>159</sup> *KPMG* para [39]; Cornelius (2009) *TSAR* 775.

<sup>160</sup> The parol evidence rule has only been limited or abolished to a certain extent by a few provisions in the CPA, see Ch 4 para 4.3.2.7.

<sup>161</sup> Most fixed-term agreements contain a clause that stipulates when and how parties should give notice of termination, see for instance on lease agreements Sharrock *Business Transactions* 321. See De Wet & Van Wyk *Kontraktereg* 146 and Van Jaarsveld & Oosthuizen *Handelsreg* 195 on the termination of contracts in general, and Van Jaarsveld & Oosthuizen *Handelsreg* 184 on termination of contract by compliance. For a discussion of the termination of fixed-term contracts see Ch 4 para 4.2.3.7. When fixed-term contracts are governed by legislation such as the CPA, the legislation normally prescribes the termination notice period. See s 14 CPA.

contract<sup>162</sup> which may give rise to problems when one of the parties wishes or needs to terminate the agreement.<sup>163</sup>

The Supreme Court of Appeal considered this question in *Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd*.<sup>164</sup> It found that the agreement in question had no specific clause governing duration and also no suggestion that the parties planned to be bound in perpetuity. Therefore, the court investigated the nature of the relationship between the parties and the surrounding circumstances when the agreement was concluded. The agreement required the parties to maintain a close working relationship and communicate regularly. The court saw this as signifying that the relationship could not continue in perpetuity as its continued application depended on numerous factors such as production costs and exchange rates. It was therefore necessary to import a tacit term to the effect that either party could terminate the agreement by way of reasonable notice to the other party.<sup>165</sup> The judgment in *Plaaskem* shows that the courts will use their discretion to protect parties and ensure a reasonable and fair result, even if the parties had not initially foreseen or expressly provided for such an eventuality.<sup>166</sup>

The duration of contracts is of special importance for the purpose of this thesis as regulation 5 of the CPA regulations limits the maximum duration of fixed-term contracts to 24 months.<sup>167</sup>

### 3.2.11 The penalty clause<sup>168</sup>

#### 3.2.11.1 Introduction

A penalty clause is a protective measure in an agreement in terms of which the parties agree – generally when concluding the agreement – to a predetermined amount of damages in case of breach.<sup>169</sup> A penalty clause serves two purposes. First, it discourages breach of contract;<sup>170</sup> and second, where breach occurs, it

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<sup>162</sup> Mudzviti (2018) *De Rebus* 18-19.

<sup>163</sup> Mudzviti (2018) *De Rebus* 19.

<sup>164</sup> 2014 (5) SA 287 (SCA) (hereafter *Plaaskem*).

<sup>165</sup> *Plaaskem* paras [21]–[27]. Also see the discussion of *Plaaskem* by Mudzviti (2018) *De Rebus* 18-19; *Trident Sales (Pty) Ltd v AH Pillman & Son (Pty) Ltd* 1984 (1) SA 433 (W). On the interpretation of the duration of agreements also see *Llanelly Railway and Dock Company v London and North-Western Railway Company* (1873) LR 8 Ch App 942 (CA) 950; *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A); *Amalgamated Beverage Industries Ltd v Rond Vista Wholesalers* 2004 (1) SA 538 (SCA); Carnegie (1969) LQR 411-412.

<sup>166</sup> Also see Bradfield *Christie's Law of Contract* 504-506 for a general discussion of the termination of contracts entered into for an unspecified period.

<sup>167</sup> See Ch 4 para 4.2.3.7.

<sup>168</sup> Also known as the *stipulatio poenae*, De Wet & Van Wyk *Kontraktereg* 234.

<sup>169</sup> De Wet & Van Wyk *Kontraktereg* 234; Hutchison et al *Law of Contract* 242; Bradfield *Christie's Law of Contract* 661-665; Sharrock *Business Transactions* 768-769.

<sup>170</sup> Referred to as a clause *in terrorem* which means a clause to frighten a party and thereby discourage him or her from breaching the agreement, Cassell's *Latin Dictionary* 601; Van Jaarsveld & Oosthuizen *Handelsreg* 178.

prevents the time-consuming, difficult, and often expensive procedure of calculating and proving a specific amount of damages.

In Roman law a penalty clause was enforceable without reduction or discount.<sup>171</sup> It was accessory to the principal obligation and therefore the creditor could not claim both performance in terms of the agreement and the penalty clause amount.<sup>172</sup> In medieval times, penalty clauses were not often used, but did not disappear altogether.<sup>173</sup>

Different types of penalty clause have developed to cover a variety of eventualities.<sup>174</sup> It is important to differentiate between contractual penalty clauses, and penalty stipulations to which the Conventional Penalties Act<sup>175</sup> applies.<sup>176</sup> In terms of the Penalties Act a stipulation will be a penalty stipulation (falling under the Act) if the clause comes into operation upon breach of a contract.<sup>177</sup> The other type of penalty clause is one to which the parties have agreed, and does not depend on breach by either or both parties. In such an instance the Penalties Act does not apply.<sup>178</sup>

The effect and treatment of these two types of clause are the same, and the law treats them equally, regardless of whether they were intended to discourage breach of contract or penalise the party in breach.<sup>179</sup> Even if the stipulation is not covered by the Penalties Act, a court always has the discretion to reduce the amount of a penalty clause if it finds it excessive.<sup>180</sup> The innocent party cannot claim both damages and the amount stipulated in a penalty clause.<sup>181</sup>

Penalty clauses are relevant for the purpose of fixed-term contracts under section 14 of the CPA, as section 14(2)(b)(i)(bb) of the CPA entitles the consumer to terminate the agreement at any time during the contract term, by giving the supplier 20 days' notice. However, section 14(3)(b)(i) entitles the supplier to impose a reasonable cancellation penalty because of the termination. This penalty is not

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<sup>171</sup> D 22.1.44 available at

<http://legalhistorysources.com/Law508/Roman%20Law/JustinianDigest.htm> (date of use: 4 November 2019); De Wet & Van Wyk *Kontraktereg* 234.

<sup>172</sup> De Wet & Van Wyk *Kontraktereg* 235.

<sup>173</sup> De Wet & Van Wyk *Kontraktereg* 235.

<sup>174</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 177; De Wet & Van Wyk *Kontraktereg* 234.

<sup>175</sup> Act 15 of 1962 (Penalties Act). In cases of conflict between the Penalties Act and the National Credit Act 34 of 2005 (Credit Act) the provisions of the Credit Act prevail.

<sup>176</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 179; the court will look at the true intention of the parties when deciding if the Penalties Act applies, and not merely at simulated acts.

<sup>177</sup> Section 1 of the Penalties Act; Sharrock *Business Transactions* 768-769. This aspect is discussed in greater detail in Ch 4 para 4.2.3.7.10.

<sup>178</sup> For example, *roukoop* and *arrha*. See paras 3.2.11.6 and 3.2.11.7.

<sup>179</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 178; Bradfield *Christie's Law of Contract* 662.

<sup>180</sup> De Wet & Van Wyk *Kontraktereg* 235; Van Jaarsveld & Oosthuizen *Handelsreg* 178; Bradfield *Christie's Law of Contract* 662; *Western Credit Bank Ltd v Kajee* 1967 (4) SA 386 (N) 391.

<sup>181</sup> Section 2(1) of the Penalties Act; Sharrock *Business Transactions* 769.

based on breach of the agreement, but is expressly authorised by statute and is not subject to the provisions of the Penalties Act.<sup>182</sup>

Most common-law penalty clauses have been prohibited by the CPA,<sup>183</sup> but it remains important to consider these clauses, because if provided for and regulated in the CPA they could work to the advantage of either party. For example, if the amount of the reasonable penalty in section 14(3)(b)(i) of the CPA is agreed on beforehand and disclosed in the fixed-term contract, the consumer knows how much he or she must pay when cancelling the agreement under section 14(2)(b)(i) of the CPA. The consumer could then also avoid having to turn to the ombud to establish if the cancellation penalty is reasonable.<sup>184</sup> I briefly consider a few penalty clauses to establish the purpose, the protection provided to the innocent party, and the value and use of each in commercial practice under the common law.

### 3.2.11.2 *Lex commissoria*<sup>185</sup>

The *lex commissoria* operates as a resolutive condition and stipulates that in the event of default by the purchaser, the seller will have the right to cancel or resile from the contract, at his or her choice.<sup>186</sup> Van den Heever AJ explained in *Baines Motors v Piek*<sup>187</sup> that it is irrelevant whether or not the purchaser benefits from the exercise of the *lex commissoria*.<sup>188</sup> An example of this in a fixed-term agreement is where a lessee is required to pay a deposit under a lease agreement, failing which the supplier has the right to cancel or resile from the agreement.<sup>189</sup>

### 3.2.11.3 *Pre-estimation of damages*

A pre-estimation of damages clause contains an approximation of the amount of damages the innocent party will suffer in the event of breach by the other party. As it is based on breach, it is covered by the provisions of the Penalties Act.<sup>190</sup>

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<sup>182</sup> See the discussion of this aspect in Ch 4 para 4.2.3.7.10; Sharrock *Business Transactions* 768-769.

<sup>183</sup> For example, clauses provided for in s 51(1)(h) of the CPA.

<sup>184</sup> See, eg, the discussion in Ch 4 para 4.4.2.

<sup>185</sup> 'Resolutive condition' Hiemstra & Gonin *Drietalige Regswoordeboek* 220. The *lex commissoria* is a form of *pactum adiectum*, which means additional agreement, Hiemstra & Gonin *Drietalige Regswoordeboek* 251. The *pacta adiecta* are terms or clauses used in contracts that oblige either party to undertake an additional or ancillary obligation apart from the main purpose of the contract. See Zulman & Dicks *Norman's Purchase and Sale* 92. Other forms of *pacta adiecta* are the *addictio in diem*, *pactum displicentiae*, *pactum de retrovendendo*, and *pactum de retroemendo*. See para 3.2.13 for a brief discussion of these terms.

<sup>186</sup> Hiemstra & Gonin *Drietalige Regswoordeboek* 220.

<sup>187</sup> 1955 (1) SA 534 (A) (hereafter *Baines*).

<sup>188</sup> *Baines* 542.

<sup>189</sup> Depending on the wording it could also be a suspensive condition.

<sup>190</sup> Hutchison et al *Law of Contract* 341. See s 1 of the Penalties Act. However, when the contract is terminated lawfully, either in terms of the agreement or in terms of legislation, eg s 14(2)(b)(i)(bb), the termination should not be subject to the provisions of the Penalties Act – see



However, if the CPA is amended to include a sliding scale or formula for the pre-estimation of damages it would benefit the consumer as he or she would know the exact amount payable should he or she decide to cancel in terms of section 14(2)(b)(i) of the CPA. If the amount is unreasonable, it may be adjusted by a court of law. At this stage there is uncertainty regarding the calculation of the reasonable amount for the penalty provided for in regulation 5 of the CPA.<sup>191</sup> When such formula for pre-estimation is provided for in the CPA, and the cancellation is one intended in section 14(2)(b)(i)(bb), the Penalties Act will not apply.

#### 3.2.11.4 Forfeiture clause

A forfeiture clause is aimed at negating the effects of *restitutio in integrum*<sup>192</sup> where the purchaser breaches the contract after having made initial payments. The forfeiture clause entitles the seller to retain the instalments already paid in the event of breach by the purchaser, even though the purchaser must return the *merx*. Under normal circumstances, the general rule on the rescission of an agreement is that both parties must make restitution.<sup>193</sup>

It is clear that a forfeiture clause can be just as prejudicial as a penalty clause, as the amount retained by the seller is not necessarily in line with the damages he or she suffered.<sup>194</sup> The legislature noted Van den Heever JA's judgment in *Baines* where he held that the position in South African law on forfeiture clauses gave rise to an 'illogical situation' as a pre-estimation of damages could be more detrimental than a penalty.<sup>195</sup> As a result, the legislature introduced the Penalties Act which also applies to forfeiture clauses. The forfeiture clause can be used or activated at the instance of the seller, and the Penalties Act applies to forfeiture clauses.

In practice, when a supplier prematurely terminates a cell phone purchase agreement linked to voice, data, and other services, based on default or non-performance by the consumer, the consumer would have to return the cell phone to the supplier. In these circumstances, the consumer would not be entitled to be

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the discussion in Ch 4 para 4.2.3.7.10. A pre-estimation or a formula for the calculation of the penalty in s 14 would provide certainty on the amount payable in the event of the consumer cancelling under s 14. As the penalty is not for a breach in that the cancellation in this case is provided for in s 14(2)(b)(i)(bb) of the CPA, the Penalties Act will not apply to this amount.

<sup>191</sup> See discussion in Ch 4 para 4.2.3.7.10.

<sup>192</sup> Meaning restore to the previous position, see Hiemstra & Gonin *Drietalige Regswoordeboek* 281; *Cassell's Latin Dictionary* 519, 317.

<sup>193</sup> De Wet & Van Wyk *Kontraktereg* 236; *Barenblatt & Son v Dixon* 1917 CPD 319, 324.

<sup>194</sup> De Wet argues that this is the position because the courts followed a maxim by Voet, and erred in blindly following an incorrect judgment in *Mangold Bros v Greyling's Trustee* 1910 EDL 471. De Wet & Van Wyk *Kontraktereg* 236-237. De Wet is of the opinion that Voet neglected to qualify this maxim in the specific instance, although he referred to the qualification (to reduce the amount if unreasonable) later in the text, and so perhaps did not see the need to qualify it earlier. Also see the judgment by Van den Heever AJ in *Baines*.

<sup>195</sup> *Baines* 543.

reimbursed for instalments already paid, and it can be argued that the effect is similar to that of the forfeiture clause.

### 3.2.11.5 *Acceleration clauses*

The purpose of an acceleration clause is to accelerate payment(s) in terms of an agreement in the event of non-payment of a part of the purchase price by the debtor. The acceleration clause does not commence automatically, the creditor can choose to use it or not.<sup>196</sup> Because the clause does not notably increase the total amount payable by the debtor, but merely accelerates payment in terms of the agreement, the general understanding is the Penalties Act does not apply to acceleration clauses<sup>197</sup> save when the clause also entitles the creditor to claim all finance charges on commencement of the acceleration clause.<sup>198</sup>

Where goods and services are sold under a fixed-term agreement coupled with a credit agreement as payment for the goods,<sup>199</sup> one could argue that on termination of the agreement by the supplier, based on default or non-performance by the consumer, the NCA would apply to the goods in terms of the credit agreement, and that an acceleration clause could apply to the goods part of the agreement.<sup>200</sup>

### 3.2.11.6 *Roukoop*<sup>201</sup>

Roukoop is an amount the purchaser is prepared to pay to withdraw from an agreement.<sup>202</sup> Roukoop can be paid where A purchases an item from B, and then decides not to proceed with the purchase. A now contacts B and offers B an amount of R10 000 to withdraw from the agreement. B accepts the R10 000 as roukoop and the agreement is cancelled. A roukoop clause can also be inserted or agreed upon in the agreement, so providing the purchaser with the option to withdraw from the agreement without committing breach of contract. This is referred to as a *ius poenitendi*.<sup>203</sup> Roukoop is used at the sole discretion of the purchaser, and so differs from the penalty clause, the forfeiture clause, and the *lex commissoria*.<sup>204</sup> The

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<sup>196</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 178 nn 332 and 333; Hutchison et al *Law of Contract* 311, 343.

<sup>197</sup> Sharrock *Business Transactions* 769; Van Jaarsveld & Oosthuizen *Handelsreg* 178; Hutchison et al *Law of Contract* 343 differ from this and claim that the position of acceleration clauses is not clear in the Penalties Act. See also *Claude Neon Lights SA Ltd v Schlemmer* 1974 (1) SA 143 (N); *Premier Finance Corporation (Pty) Ltd v Rotainers (Pty) Ltd & Another* 1975 (1) SA 79 (W) 83; *Parekh v Shah Jehan Cinemas* 1982 (3) SA 618 (D) 628.

<sup>198</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 178.

<sup>199</sup> For example, where an expensive item is sold and the consumer secures credit to pay for the item.

<sup>200</sup> For a discussion of the applicability of the CPA to credit agreements see Melville (2010) SA *Merc LJ* 272-278.

<sup>201</sup> Sometimes spelt *rouwkoop*, literally meaning regret money see <https://www.yourdictionary.com/roukoop> (date of use: 13 January 2019).

<sup>202</sup> De Wet & Van Wyk *Kontraktereg* 240; Van den Heever JA *Baines* 542 [D]–[E]. Related to roukoop, but with differences in principle, is *arrha*, see the discussion of *arrha* in para 3.2.11.7.

<sup>203</sup> The right to pay money as atonement – see *Cassell's Latin Dictionary* 454.

<sup>204</sup> Van den Heever JA in *Baines* 542[D–F].

Penalties Act does not apply to roukoop as the purchaser chooses to implement it and therefore does not commit breach of contract.<sup>205</sup> However, roukoop could prove useful to the consumer in the circumstances of section 14(2)(b)(i)(bb) of the CPA, as the consumer would know the extent of the cancellation penalty beforehand. However, as the CPA currently reads, roukoop would probably be prohibited in terms of section 51(1)(h) of the CPA.<sup>206</sup>

### 3.2.11.7 *Arrha*<sup>207</sup>

*Arrha* is an amount paid as proof of the earnest intention to do business.<sup>208</sup> Normally *arrha* is an insignificant amount and does not affect the parties' contractual relationship.<sup>209</sup> When a party commits a breach of contract, he or she not only forfeits the *arrha*, the other party can still claim damages.<sup>210</sup> This of course, is the main difference between roukoop and *arrha*, as roukoop is not a breach of contract.<sup>211</sup> Nowadays, *arrha* is rarely used in practice.

### 3.2.11.8 *Concluding remarks: Penalty clauses*

The debtor can approach a court to decide whether the amount in a penalty clause is in proportion to the creditor's damages suffered.<sup>212</sup> To establish whether the amount of the penalty is reasonable the court will take into account all factors affecting the creditor's interests that could possibly have been caused by the debtor's breach or omission.<sup>213</sup> The advantage of inserting a penalty clause is that the amount is determinable and becomes due and payable on breach of contract.<sup>214</sup>

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<sup>205</sup> Hutchison et al *Law of Contract* 342-343; Van Jaarsveld & Oosthuizen *Handelsreg* 179; De Wet & Van Wyk *Kontraktereg* 240;

<sup>206</sup> See the discussion in Ch 4 para 4.3.2.3.3.

<sup>207</sup> *Arrha* means earnest money, see Hiemstra & Gonin *Drietalige Regswoordeboek* 159. *Arrha* is sometimes spelt *arra*, see Van Zyl *Geskiedenis* 287.

<sup>208</sup> De Wet & Van Wyk *Kontraktereg* 239; Van Jaarsveld & Oosthuizen *Handelsreg* 179; Joubert *General Principles* 264.

<sup>209</sup> There are two types of *arrha*: *arrha pacto imperfecto data* (earnest money at preliminary negotiations, Hiemstra & Gonin *Drietalige Regswoordeboek* 159) which is paid as earnest money to show serious intention with and during the negotiations and is forfeited when the party withdraws from the negotiations – see De Wet & Van Wyk *Kontraktereg* 239-240; Van Jaarsveld & Oosthuizen *Handelsreg* 179; Joubert *General Principles* 264. The second form, *arrha confirmatoria* (confirmatory earnest money, Hiemstra & Gonin *Drietalige Regswoordeboek* 159) on the other hand, shows the earnest intention to enter into, and fulfil contractual obligations, and is paid at conclusion of the agreement – see Van Jaarsveld & Oosthuizen *Handelsreg* 179; Joubert *General Principles* 264. This amount must be returned when the party has fulfilled his obligations in terms of the agreement. If he does not fulfil his obligations the *arrha* is not returned and the contract remains valid. Therefore *arrha* is not a deposit, and does not form part of the purchase price. It is merely symbolic, as a token to prove the purchaser's serious intent to enter into an agreement.. Also, see Van den Heever JA in *Baines* 542[F-G].

<sup>210</sup> De Wet & Van Wyk *Kontraktereg* 239-240.

<sup>211</sup> De Wet & Van Wyk *Kontraktereg* 240.

<sup>212</sup> Section 3 of the Penalties Act. The burden of proof lies with the debtor.

<sup>213</sup> Du Bois et al *Wille's Principles* 886; *Van Staden v Central SA Lands & Mines* 1969 (4) SA 349 (W) 352.

<sup>214</sup> De Wet & Van Wyk *Kontraktereg* 243.

A party penalised in terms of section 14(2)(b)(i)(bb) can, therefore, always approach a court to establish if the penalty is reasonable. It is important to note that the penalty provided for in section 14 of the CPA is not a penalty in the normal sense that penalises the consumer for a breach of contract.<sup>215</sup> Section 14 allows the consumer to cancel, and the penalty is therefore not damages for a breach of contract and is not subject to the Penalties Act.<sup>216</sup> However, a pre-estimation of damages could prove useful to a consumer when deciding to cancel in terms of section 14(2)(b)(i)(bb) of the CPA as he or she would know beforehand exactly what amount would be due on cancellation.

### 3.2.12 Other terms and conditions<sup>217</sup>

There is a range of conditional clauses either party can use to protect him- or herself – generally in anticipation of a specific event or a potential risk. Some of these conditional clauses are considered below and explained by way of examples.

#### 3.2.12.1 Voetstoots<sup>218</sup>

A voetstoots clause protects the seller by excluding a warranty against latent defects in the *merx*.<sup>219</sup> The *merx* is sold as is, and the seller is not responsible for latent defects unless he or she was aware of these, or made misrepresentations about the *merx*. A *mala fide* seller is, therefore, not protected by a voetstoots clause.<sup>220</sup> The CPA limits voetstoots clauses in consumer transactions, as they in all likelihood contravene the provisions of section 51(1)(a)-(c) of the CPA.<sup>221</sup> However, the voetstoots clause is still used regularly in, for instance, sales agreements of immovable property by individuals.

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<sup>215</sup> See Ch 4 para 4.2.3.7.10.

<sup>216</sup> Naudé & Eiselen (eds) *Juta's Commentary* 14-13. This aspect and the calculation and guidelines in reg 5 to calculate a reasonable penalty is discussed in Ch 4 para 4.2.3.7.10.

<sup>217</sup> A purchaser or consumer will not normally have the option of making use of these conditions, unless he is in strong bargaining position. Therefore, as consumers will normally not be in a position to make use of these conditions in a standard-form agreement, they are not discussed in detail. If inserted in an agreement in terms of s 14 of the CPA it will be at the instance and to the advantage of the supplier/seller. Measures such as modal clauses are also not discussed as they are very rarely used and should in all probability never be used in connection with a s 14 fixed-term agreement.

<sup>218</sup> Meaning without a warranty or as it stands – Hiemstra & Gonin *Drietalige Regswoordeboek* 489.

<sup>219</sup> Joubert *General Principles* 52. Voetstoots clauses are not permitted in contracts that fall under the National Credit Act, and the Consumer Protection Act appears to limit the protection provided to sellers. See Sharrock *Business Transactions* 302, 684; Otto (2011) *THRHR* 525, 535-544. This aspect is dealt with in greater detail in Ch 4.

<sup>220</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 365. The position of the seller who misleads a purchaser by innocent misrepresentation is uncertain, see De Wet & Van Wyk *Kontraktereg* 345. Also related to misrepresentation is puffing, *dicta et promissa*, warranties, sales talk, and mere opinion. See Hutchison et al *Law of Contract* 119-120 for a detailed discussion and a Venn diagram depicting and explaining the overlap and importance of these terms to establish liability.

<sup>221</sup> For a full discussion see Stoop (2018) *THRHR* 650; Barnard (2012) *De Jure* 455; Morissey & Coetzee (2010) *Without Prejudice* 12 contend that there is uncertainty surrounding this issue.

### 3.2.12.2 *Suspensive conditions*

Suspensive conditions aim to delay the commencement of the agreement, normally for practical reasons – eg, when the purchaser needs to apply for a loan or bond to finance the purchase price of the *merx*. So, if a purchaser purchases immovable property but needs to apply for a bond, the commencement of the agreement is suspended until the purchaser has obtained sufficient funds to proceed with the agreement.<sup>222</sup> Suspensive conditions remain relevant for the purpose of the CPA, as one could argue that the financial investigation to establish whether a consumer can afford a particular cell phone in a fixed-term contract under the CPA is similar to a suspensive condition.

### 3.2.13 *Various measures not generally used*

There are various conditional clauses that protect both parties under the common law, which will probably not be encountered in the common-law format in fixed-term contracts under the CPA. I mention these to illustrate the extent to which the common law provides flexibility for parties to negotiate all terms and conditions in an agreement individually. Some of these conditions are entrenched in the CPA in a different format or wording, but have a similar effect in practice. These include, but are not limited to:

- Resolutive conditions that aim to dissolve the agreement on the occurrence of a specific eventuality.<sup>223</sup> A resolutive condition can, for example, stipulate that a person acts as surety for another's obligations for 60 days. On expiry of the agreed period, the surety agreement will lapse.
- *Addictio in diem*,<sup>224</sup> which is a special condition that means although the seller has entered into an agreement of sale in respect of the *merx*, he or she retains the right to accept a better offer within a specified period.<sup>225</sup>

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<sup>222</sup> De Wet & Van Wyk *Kontraktereg* 146.

<sup>223</sup> De Wet & Van Wyk *Kontraktereg* 146; Bradfield *Christie's Law of Contract* 167.

<sup>224</sup> Literally meaning 'adjudging to a certain day', *Cassell's Latin Dictionary* 11 188. See Berwick <https://books.google.co.za/books?id=IAAWAwAAQBAJ&pg=PA36&lpg=PA36&dq=English+meaning+g+%22addictio+in+diem%22&source=bl&ots=9DpSCA0oA2&sig=ACfU3U3yJuO8h9kAvZtlbUcN7FjBXU-M1g&hl=en&sa=X&ved=2ahUKEwjNil-I3IDgAhXB1-AKHR46A84Q6AEwBHoECACQAQ#v=onepage&q=English%20meaning%20%22addictio%20in%20diem%22&f=false> (date of use: 22 January 2019).

<sup>225</sup> In practice this is referred to as the 'back door' clause. A back door clause is mainly used in agreements of sale of immovable property, especially where the sale is subject to the approval of a bond for the balance of the purchase price. Its purpose is to protect the seller whose property is being actively marketed against non-approval of the purchaser's bond after a long waiting period as stipulated in a suspensive condition. When using the back door clause the seller can continue marketing his or her property while awaiting approval of the purchaser's bond, and can accept a better offer, whether it is a better price, or a cash offer for the same amount or even less if immediately available in cash, as stipulated in the *addictio in diem*, within the agreed period. Zulman & Dicks *Norman's Purchase and Sale* 92.

- *Pactum displicentiae*<sup>226</sup> is a clause which provides that if the purchaser is not satisfied with the *res vendita*, he or she can return it. This clause is known as an agreement subject to approval by the purchaser within a specified period, or commonly as 'appro'.<sup>227</sup> It is similar to the statutory cooling-off period in section 16 of the CPA, or to a warranty under section 55 of the CPA.
- *Pactum de retrovendendo*<sup>228</sup> is a clause that protects the seller by entitling him or her to repurchase the *merx* from the purchaser within a specified period, on demand, or when a specific event occurs, as agreed in the contract.<sup>229</sup>
- *Pactum de retroemendo*<sup>230</sup> obliges the seller to repurchase the *merx* either on demand or when a certain event takes place, thereby in effect entitling the purchaser to a cancellation of the agreement and the reimbursement of the purchase price in specific pre-determined circumstances.<sup>231</sup>
- Supposition clauses are based on a supposition,<sup>232</sup> and are another protective measure.<sup>233</sup> Here parties enter into an agreement based on a certain supposition of existing facts. If or when the facts do not materialise, or turn out not to be as supposed, the agreement does not take effect.<sup>234</sup>

### 3.2.13.1 Guarantees

A guarantee is a safeguard that a specific payment or performance will take place. For example, where the purchase price of immovable property must be paid to the seller against registration of the property in the name of the purchaser.<sup>235</sup> In practice, the purchaser cannot risk paying the purchase price to the seller before receiving transfer of the property. Should transfer not be effected into his or her name, he or she risks losing the purchase price. He or she therefore arranges with a financial institution to issue guarantees payable to the seller on date of registration of the

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<sup>226</sup> A cancellation clause or agreement, Hiemstra & Gonin *Drietalige Regswoordeboek* 251.

<sup>227</sup> Many clothing stores allow customers to take merchandise on approval for a specified period. This clause protects the purchaser and enables him or her to try out the *merx* in order to satisfy him- or herself that it complies with his or her requirements. If not satisfied the purchaser can return the item within the prescribed period and be refunded. Zulman & Dicks *Norman's Purchase and Sale* 97.

<sup>228</sup> An agreement to repurchase the item sold, Hiemstra & Gonin *Drietalige Regswoordeboek* 251.

<sup>229</sup> Zulman & Dicks *Norman's Purchase and Sale* 98, *Mouton v Hanekom* 1959 (3) SA 35 (A) 39.

<sup>230</sup> An agreement to buy back, Hiemstra & Gonin *Drietalige Regswoordeboek* 251.

<sup>231</sup> Zulman & Dicks *Norman's Purchase and Sale* 98; *Black v Le Voy* 1924 EDL 176, 182-183.

<sup>232</sup> Supposition means that parties have an idea, or suppose that something is true, but are not certain. See <https://dictionary.cambridge.org/dictionary/english/supposition> (date of use: 4 February 2020).

<sup>233</sup> De Wet & Van Wyk *Kontraktereg* 155; Van Jaarsveld & Oosthuizen *Handelsreg* 131.

<sup>234</sup> *Rossouw v Hauman* 1949 (4) SA 796 (C) 801-802; *Dickinson Motors (Pty) Ltd v Oberholzer* 1952 (1) SA 443 (A) 449-450.

<sup>235</sup> Bradfield Christie's *Law of Contract* 479-480.

property in his or her name. This is one of the practical ways of ensuring reciprocity where simultaneous performance is difficult or potentially risky.

### 3.2.13.2 *Warranties*

The purpose of a warranty is slightly different to a guarantee.<sup>236</sup> A warranty guarantees certain qualities or characteristics of a product for a specific period during normal use. It is generally printed on a leaflet accompanying a *merx*. A warranty is important for purposes of fixed-term agreements, as sections 55-57 of the CPA provides for the consumer's right to safe and good-quality goods, implied warranties, and a warranty on repaired goods.<sup>237</sup>

### 3.2.13.3 *Entrenchment clauses*<sup>238</sup>

Entrenchment clauses aim to protect certain clauses or contracts, for example by providing that a clause(s) or contract can only be amended by way of written amendments,<sup>239</sup> or with the approval of a certain prescribed voting percentage, or perhaps, not at all.<sup>240</sup> These clauses are not limited to contracts, and are also used in constitutions.<sup>241</sup>

### 3.2.13.4 *Exclusion clauses*<sup>242</sup>

An exclusion clause aims to exclude liability as stipulated in the agreement. There is no legal prohibition on exclusion clauses except those prohibited by legislation.<sup>243</sup> The CPA prohibits or limits certain exclusions in section 51(1).

### 3.2.13.5 *Concluding remarks: Various other terms and conditions*

It is clear that many of the terms and conditions used in the common-law of contract to protect either party, can and still do play a role in consumer agreements,

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<sup>236</sup> Although the terms warranty and guarantee are sometimes used interchangeably.

<sup>237</sup> See the discussion in Ch 4 para 4.3.3.4.

<sup>238</sup> Section 49 of the CPA provides that material changes to an agreement are to be advised in writing, and is therefore similar to an entrenchment clause.

<sup>239</sup> Section 14(2)(c)(i) of the CPA could be viewed as similar to an entrenchment clause as it provides the supplier must notify the consumer in advance of material changes applicable to the renewal of the agreement.

<sup>240</sup> See <https://www.translegal.com/legal-english-dictionary/entrenchmentclause> (date of use: 15 January 2019).

<sup>241</sup> For example, the Bill of Rights in the Constitution.

<sup>242</sup> Exclusions which exclude suppliers' liability are normally not permitted in CPA contracts – see the blacklist in s 51 of the CPA, as well as the grey list. See Ch 4 paras 4.3.2.3.3 and 4.3.2.3.4.

<sup>243</sup> Voetstoets could qualify as an exclusion clause. Note that s 90(3) of the NCA prohibits clauses such as voetstoets, see Otto et al (2014) *SA Merc LJ* 256, and probably prohibited under the CPA, (ibid 261). See the prohibition of waivers in s 48(i)(c), exemption notice under s 48(2)(d) and reg 44 of the CPA regulations for a list of terms deemed unfair. For a recent analysis of the status of exemption clauses, see Richards *LLM*. Also see Mupangavanhu (2014) *PELJ* 1178-1189. This aspect is discussed in further detail in Ch 4 para 4.3.3.4.

especially as the common law remains the foundation for all agreements concluded in terms of the CPA.

### 3.2.14 Misrepresentation

Misrepresentation takes place when a party makes a false material declaration before or during contractual negotiations which induces the other party to enter into the agreement.<sup>244</sup> Misrepresentation, therefore, affects consensus between the parties.<sup>245</sup> It is important to differentiate between misrepresentation and circumstances where there are *ex lege* and contractual warranties, as the remedies differ in each situation.<sup>246</sup>

Misrepresentation must be distinguished from 'sales talk' or 'puffing'<sup>247</sup> in that puffing is not regarded as misrepresentation under common law, but as the expression of an opinion and the mere commendation and praising of a product.<sup>248</sup> However, when a statement made by the seller is more than mere praise, and relates to the quality of the *res vendita*, it is regarded as a material statement and will be regarded as a *dictum et promissum*.<sup>249</sup> A material statement, however, is strictly regulated in the CPA, specifically in section 41(1)(b). At first glance this section prohibits puffing, but as the section has not yet featured before the courts it remains to be seen how the courts will approach it.

### 3.2.15 Fictional fulfilment

The maxim of fictional fulfilment is relevant when an agreement is subject to the fulfilment of conditions, and either of the parties frustrates or prevents the fulfilment of the conditions. This maxim aims to protect the innocent party. Therefore, when an agreement is subject to a condition or conditions, also known as *pendente*

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<sup>244</sup> De Wet & Van Wyk *Kontraktereg* 41-48; Van Jaarsveld & Oosthuizen *Handelsreg* 357; Khan et al *Contract and Mercantile Law* vol 1 209; Glover *Kerr's Sale and Lease* 223-227; Sharrock *Business Transactions* 137-142; Hutchison et al *Law of Contract* 116-117. For a discussion of misrepresentation see Van Huyssteen et al *Contract* 98-111; *Trotman and Another v Edwick* 1951 (1) SA 443 (A) 447-448; *Minister van Landbou-Tegniese Dienste v Scholtz* 1971 (3) SA 188 (A); *Davidson v Bonafede* 1981 (2) SA 501 (C). Also see *Orban v Stead & Another* 1978 (2) SA 713 (W) for a judgment that appears to have been incorrect. See also in this regard the criticism by Khan et al *Contract and Mercantile Law* vol 1 212.

<sup>245</sup> Hutchison et al *Law of Contract* 83-90.

<sup>246</sup> De Wet & Van Wyk *Kontraktereg* 48; Van Jaarsveld & Oosthuizen *Handelsreg* 357; Hutchison et al *Law of Contract* 117-118, 122-125; *Gannet Manufacturing Co v Postaflex* 1981 (3) SA 216 (C) 223-224.

<sup>247</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 357; Glover *Kerr's Sale and Lease* 225; Sharrock *Business Transactions* 142-143.

<sup>248</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 357; Van Huyssteen et al *Contract* 104; Hutchison et al *Law of Contract* 118-119. In *Corbett v Harris* 1914 CPD 535, 543 the court points out that puffing is not actionable and that the maxim *caveat emptor* will apply. See the discussion of this aspect under the CPA, Ch 4 para 4.3.2.3.2.

<sup>249</sup> In these circumstances the purchaser will be entitled to restitution, see Van Rensburg & Van der Merwe *Law of Contract* 56; *Phame v Paizes* 1973 (3) SA 397 (A) 417.



*condicione*,<sup>250</sup> there is an existing and binding legal relationship between the parties, even though the contract is not complete. Both parties are obliged to work towards fulfilling the condition(s). When a party prevents or frustrates the fulfilment of a condition, fictional fulfilment will assist the innocent party as this fiction will deem the condition to have been fulfilled and provide protection for the innocent party.<sup>251</sup>

### 3.2.16 Leases

Because of the importance of lease agreements for consumers, and the initial difference of opinion as to whether lease agreements fall under fixed-term contracts for purposes of section 14 of the CPA, I discuss the common-law principles of lease agreements.

All lease agreements that qualify as consumer agreements are subject to the provisions of section 14 of the CPA.<sup>252</sup> There was initial doubt as to whether the CPA applied to leases of immovable property, but the courts have decided that leases are fixed-term agreements as defined in section 14.<sup>253</sup>

A lease agreement is a contract in which the lessor agrees to let his or her property to the lessee in return for payment.<sup>254</sup> There are only two *essentialia* of a lease: first, the lessee enjoys the occupation and use of the property rented; and second, the lessee must pay rental to the lessor for such use or occupation. Glover emphasises that these are the only essential elements for lease, although some writers argue for a third essential: the lease period.<sup>255</sup>

In Roman law, because the lessee was not the owner of the property, he only had a personal right to possession and occupation. When the property was sold during the lease term, the lessee was left open to eviction by the new owner.<sup>256</sup> In Roman-Dutch law this changed, and the lessee was granted a real right of possession and occupation for the duration of the lease term. A special remedy developed to protect lessees when the leased property was sold before expiry of the lease term – the ‘huur gaat voor koop’ principle which literally means lease enjoys priority over sale.<sup>257</sup> This maxim entitles lessees to remain in occupation of the leased property

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<sup>250</sup> Subject to condition, Hiemstra & Gonin *Drietalige Regswoordeboek* 254.

<sup>251</sup> Joubert *General Principles* 173; Hutchison et al *Law of Contract* 251; Bradfield *Christie's Law of Contract* 173-174; *Scott v Poupard* 1971 (2) SA 373 (A) 378. See Joubert *General Principles* 173-178 and Bradfield *Christie's Law of Contract* 173-178 for a discussion, relevant sources, and the requirements for the implementation of this theory.

<sup>252</sup> Glover *Kerr's Sale and Lease* 335-337; Barnard (2019) *THRHR* 164-175; ss 1, 5 and 14 of the CPA. For a discussion of lease agreements under the CPA see Ch 4 para 4.2.3.8.

<sup>253</sup> See Ch 4 para 4.2.3.8.

<sup>254</sup> Glover *Kerr's Sale and Lease* 329; De Wet & Van Wyk *Kontraktereg* 355.

<sup>255</sup> Glover *Kerr's Sale and Lease* 329. De Wet & Van Wyk *Kontraktereg* 356 argue that an indeterminate lease is not a lease, but could, for instance, be a quitrent.

<sup>256</sup> De Wet & Van Wyk *Kontraktereg* 374.

<sup>257</sup> De Wet & Van Wyk *Kontraktereg* 374-375; Van Jaarsveld & Oosthuizen *Handelsreg* 539-542.

until the lease expires. The sales agreement is, therefore, subject to the lease agreement.<sup>258</sup>

A remedy intended to protect the lessor's right to rental is the common-law residual hypothec, a personal right on the property of the lessee in respect of unpaid rent.<sup>259</sup> Some writers argue that this hypothec only applies to unpaid rent, not other obligations of the lessee.<sup>260</sup> Glover contends that this argument is not necessarily supported by the authorities,<sup>261</sup> and that in suitable circumstances a lessor may still apply to court for an interdict attaching the lessee's goods on the premises.<sup>262</sup> He also argues that it is not clear-cut that section 51(1)(i) of the CPA prohibits the lessor's residual hypothec as the hypothec cannot be excluded in an agreement, and, therefore, also not by implication in a statute.<sup>263</sup>

These are the essential aspects of common-law lease agreements. I now discuss the legal position of parties when breach or material non-performance takes place.

### 3.3 Breach of agreement

Breach of contract takes place when one or both parties does not fulfil the obligations in terms of the agreement by failing to perform his or her obligations, by repudiating the contract, or when performance becomes impossible.<sup>264</sup> The remedies for breach are specific performance, cancellation, damages,<sup>265</sup> or a suitable combination of these remedies.<sup>266</sup>

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<sup>258</sup> Special legislation applies to lease agreements, depending on the duration of the lease and the use of the premises, eg, the Formalities in Respect of Leases of Land Act 18 of 1969 (Leases of Land Act) and the Rental Housing Act 50 of 1999 (Rental Housing Act); premises used for residential purposes are subject to the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act), and of course the Constitution applies to all agreements, *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 (2) SA 674 (CC) para [44].

<sup>259</sup> Glover *Kerr's Sale and Lease* 452-454; Van Jaarsveld & Oosthuizen *Handelsreg* 826-828; De Wet & Van Wyk *Kontraktereg* 36. There is difference of opinion as to whether the hypothec applies only in respect of unpaid rent or for other monies/obligations as well. De Wet & Van Wyk *Kontraktereg* 365 are of the opinion that the residual hypothec only applies to unpaid rent and not for other obligations of the lessee. Van Jaarsveld & Oosthuizen *Handelsreg* 826 support this argument.

<sup>260</sup> De Wet & Van Wyk *Kontraktereg* 363-366; *Webster v Ellison* 1911 AD 73, 86.

<sup>261</sup> Glover *Kerr's Sale and Lease* 453-454.

<sup>262</sup> Glover *Kerr's Sale and Lease* 454.

<sup>263</sup> Glover *Kerr's Sale and Lease* 453. This aspect is discussed in Ch 4. Also, see Kelly-Louw & Locke (2015) *THRHR* 293-306 for a discussion of a similar situation regarding the NCA.

<sup>264</sup> Du Bois et al *Wille's Principles* 858; De Wet & Van Wyk *Kontraktereg* 142; Bradfield *Christie's Law of Contract* 585; Van Huyssteen et al *Contract* 181.

<sup>265</sup> Van Huyssteen et al *Contract* 366-367; Hutchison et al *Law of Contract* 280.

<sup>266</sup> The general remedies and general principles are discussed under heading 4 below. The specific remedies in suitable circumstances will be discussed under this heading where applicable.

### 3.3.1 *Mora*<sup>267</sup>

*Mora* is a (culpable) delay or default to perform contractual obligations by either party.<sup>268</sup> Either party can commit a breach of contract by not performing at all, by performing but not adhering strictly to the contract terms, or by not performing his or her obligation(s) on time.<sup>269</sup> *Mora* can only take place if performance of the obligation is possible.<sup>270</sup> In addition, *mora* is only possible for a positive performance or act by a party to the agreement, and not for negative breach, in other words an obligation not to perform a certain act.<sup>271</sup> If *mora* makes subsequent performance by the other contracting party impossible, rendering the performance will be impossible.<sup>272</sup> Non-performance must meet certain cumulative requirements before it qualifies as *mora*:

- The first requirement for *mora* is that the defaulter fails to perform before or on the date or time specified in the agreement for performance.<sup>273</sup> If the time for performance is specified in the agreement, a party will automatically be *in mora* if he or she does not perform timeously. This is referred to as *mora ex re*,<sup>274</sup> and the defaulting party is in default without having been notified of this by the other party.<sup>275</sup>
- If the time or date of performance is not fixed or determinable in the agreement, a party will not automatically be in default when he or she does not perform before or at a certain time. When no date or time has been set for performance, the performance must take place within a 'reasonable' time. Therefore, a contracting party is not guilty of a breach of the agreement if he or she does not perform immediately. The non-defaulting party must notify the defaulter and specify a date or time for performance.<sup>276</sup> This is referred to as *mora ex persona*.<sup>277</sup> The time or date specified by the innocent party for performance must be reasonable,

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<sup>267</sup> Meaning delay or default, Hiemstra & Gonin *Drietalige Regswoordeboek* 231.

<sup>268</sup> Hiemstra & Gonin *Drietalige Regswoordeboek* 231.

<sup>269</sup> Hutchison et al *Law of Contract* 278-279.

<sup>270</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 136.

<sup>271</sup> This is referred to as positive default, Hutchison et al *Law of Contract* 280.

<sup>272</sup> See para 3.3.4 below.

<sup>273</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 136; Hutchison et al *Law of Contract* 282; Bradfield *Christie's Law of Contract* 590-595.

<sup>274</sup> Default as a result of the lapse of the time set for performance, Hiemstra & Gonin *Drietalige Regswoordeboek* 231.

<sup>275</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 136.

<sup>276</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 136-137; Hutchison et al *Law of Contract* 282-284.

<sup>277</sup> Default after notice given, Hiemstra & Gonin *Drietalige Regswoordeboek* 231.

failing which the notice of performance will not be effective.<sup>278</sup> The demand must also clearly indicate what obligation(s) must be fulfilled.<sup>279</sup>

- The debt must be due and payable. If the debt is not due and payable, or if a party is entitled to withhold performance, for example, where the creditor has not performed his or her contractual duties, the debtor is not in default.<sup>280</sup>
- The default must be caused by the defaulter. If the default was caused by the other party to the agreement, the defaulter will not be *in mora*.<sup>281</sup> In addition, if the cause of the default was accidental, or resulted from *vis maior*,<sup>282</sup> there will not be default.<sup>283</sup> The innocent party does not have to prove that the default was caused by the defaulter; rather, the defaulter must raise this as a defence. If an employee, agent, or other person for whom the defaulter is responsible caused the default, the defaulter will not be permitted to allege that the default was not his or her fault.<sup>284</sup> In addition, the defaulter must be aware that his or her performance is due, and he or she must know what the essence of the performance is.<sup>285</sup>

The consequences of *mora* are that the innocent party can now enforce his or her remedies against the defaulter.<sup>286</sup>

The CPA provides the supplier with a remedy when the consumer breaches the terms of an agreement under section 14(2)(b)(ii) of the CPA, thereby entitling him or her to cancel after giving the defaulting consumer twenty business days' notice.<sup>287</sup> Section 14, however, does not provide the consumer with a corresponding remedy when the supplier is in default or does not perform at all.

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<sup>278</sup> Hutchison et al *Law of Contract* 282; Van Huyssteen et al *Contract* 339; Bradfield *Christie's Law of Contract* 597-598; De Wet & Van Wyk *Kontraktereg* 160; *St Martin's Trust v Willowdene Landowners (Pty) Ltd* 1970 (3) SA 132 (W) 135-136; *Nel v Cloete* 1972 (2) SA 150 (A) 164; Bradfield *Christie's Law of Contract* 590 also mentions *mora ex lege* which he describes as the legal rules that apply in the case of theft, for example. The thief will then be considered in *mora ex lege* from the moment of the theft.

<sup>279</sup> Bradfield *Christie's Law of Contract* 598; *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173, 195; *Kragga Kamma Estates CC v Flanagan* 1995 (2) SA 367 (A) 374-375.

<sup>280</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 138; Van Huyssteen et al *Contract* 332; Hutchison et al *Law of Contract* 281; Bradfield *Christie's Law of Contract* 590.

<sup>281</sup> Van Huyssteen et al *Contract* 333; De Wet & Van Wyk *Kontraktereg* 162; Hutchison et al *Law of Contract* 285.

<sup>282</sup> Act of God, Hiemstra & Gonin *Drietalige Regswoordeboek* 306.

<sup>283</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 138; Hutchison et al *Law of Contract* 285.

<sup>284</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 139; De Wet & Van Wyk *Kontraktereg* 162.

<sup>285</sup> Bradfield *Christie's Law of Contract* 590.

<sup>286</sup> Fault is not a requirement for breach of contract when damages are claimed. See *Administrator of Natal v Eduard* 1990 (3) SA 581 (A) para [47]; *Scoin Trading (Pty) Ltd v Bernstein* 2011 (2) SA 118 (SCA) para [20]. Also see Cornelius (2012) *PELJ* 601-620 and the discussion in para 3.4.4 below.

<sup>287</sup> See Ch 4 para 4.2.3.7.7.

### 3.3.2 *Positive breach*

A party is guilty of positive breach when he or she acts contrary to the undertaking or agreement with the other party.<sup>288</sup> Positive breach, also known as positive default, can take two forms, depending on whether a party's required performance is positive or negative. For example, the defaulter does something he or she undertook not to do such as acting against the terms of a restraint of trade undertaking;<sup>289</sup> or his or her performance in terms of the agreement does not meet the requirements for performance set in the agreement.<sup>290</sup> For example, he or she enters into an agreement to build a bridge; he or she builds the bridge but it does not comply with the requirements set out in the plans or the agreement.

The requirements for positive default are:

- the defaulter must have performed in terms of the agreement; and
- the performance must have been materially defective.<sup>291</sup>

It is generally accepted that no fault is required for positive default.

### 3.3.3 *Repudiation of the agreement*

Repudiation occurs when a contracting party implies or signifies that he or she plans to repudiate or reject his or her obligations in terms of the agreement.<sup>292</sup> Repudiation is, therefore, a form of anticipatory breach. This points to a predicted or a reasonable certainty of breach, and such anticipatory breach takes place before actual performance.<sup>293</sup> A party can further repudiate his or her contractual obligations both expressly or by implication.<sup>294</sup> Some examples are where the defaulter acts contrary to the terms and conditions of the agreement; where he or she alleges that he or she cannot perform on the specified date; or alleges that it is impossible to perform. The defaulter's conduct must be expressly intended to repudiate or reject his or her

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<sup>288</sup> Also known as positive default, see Hutchison et al *Law of Contract* 294.

<sup>289</sup> Hutchison et al *Law of Contract* 294; Van Jaarsveld & Oosthuizen *Handelsreg* 136; Van Huyssteen et al *Contract* 340.

<sup>290</sup> Hutchison et al *Law of Contract* 294; Sharrock *Business Transactions* 753; Van Huyssteen et al *Contract* 340.

<sup>291</sup> Van Huyssteen et al *Contract* 341-344.

<sup>292</sup> Repudiation is of English origin. See De Wet & Van Wyk *Kontraktereg* 168; Van Huyssteen et al *Contract* 348.

<sup>293</sup> This differs from prevention of performance where there is certainty of malperformance, see Van Huyssteen et al *Contract* 347. The principles on inquiring into alleged conduct amounting to repudiation were recently confirmed in *Micaren Exel Petroleum Wholesaler (Pty) Ltd v Stella Quick Shop (Pty) Ltd and Another* (471/2019) [2020] ZASCA 61 (9 June 2020) (hereafter *Micaren*) paras [11-12]; also see Bradfield *Christie's Law of Contract* 610-612.

<sup>294</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 144; De Wet & Van Wyk *Kontraktereg* 169; Van Huyssteen et al *Contract* 350-351; Hutchison et al *Law of Contract* 297.

obligations in terms of the agreement. A mere failure to fulfil his or her obligations on the date of performance cannot be regarded as repudiation.<sup>295</sup>

Initially, repudiation was not deemed a breach of contract, as it was argued that such repudiation first had to be accepted by the other party.<sup>296</sup> The current view is that the repudiation itself is a breach of the agreement.<sup>297</sup> By electing to cancel the agreement, the innocent party merely exercises his or her option to resile from the agreement.<sup>298</sup> Should he or she instead choose to uphold the agreement and ignore the repudiation, he or she exercises the right to hold the repudiating party bound by the agreement.<sup>299</sup>

A noteworthy characteristic of repudiation is that it is an ongoing breach of the agreement. This means that the innocent party, after initially opting to enforce the agreement, is entitled subsequently to elect to cancel the agreement.<sup>300</sup>

The requirements for repudiation are:<sup>301</sup>

- A party to an agreement should be able to infer from the conduct of the other party, that the offending party will not, or has not complied with his or her obligations under the agreement. This non-performance must be unlawful and can be an act or an omission to perform. The mere non-performance by a party cannot be interpreted as repudiation – the

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<sup>295</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 106-107; De Wet & Van Wyk *Kontraktereg* 170. For a discussion of the differences between repudiation and other forms of breach, see Van Huyssteen et al *Contract* 352-353. Also see *Micaren* para [11].

<sup>296</sup> This view was based on a consensual cancellation of the agreement. De Wet & Van Wyk *Kontraktereg* 170-172 support this argument.

<sup>297</sup> Van Huyssteen et al *Contract* 348-350; Hutchison et al *Law of Contract* 298-299.

<sup>298</sup> *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A) 953-954; *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 358 (A) 361; *Datacolor International (Pty) Ltd v Intamerket (Pty) Ltd* 2001 (2) SA 284 SCA paras [1], [16]–[20], [25], [33] and [35]. There has been movement to and fro between the two schools of thought as courts have referred to, but seemingly not applied the old view. See Van Huyssteen et al *Contract* 350 n 224 in this regard.

<sup>299</sup> Van Huyssteen et al *Contract* 348-349.

<sup>300</sup> Hutchison et al *Law of Contract* 298; *Cohen v Orlowski* 1930 SWA 125; *Mahabeer v Sharma* 1985 (3) SA 729 (A) 736. An interesting question is whether the repudiator can, after initially repudiating the agreement and before acknowledgement thereof by the other party, decide to withdraw from the repudiation and continue with his obligations in terms of the agreement. See Hutchison et al *Law of Contract* 301. If one assumes that repudiation is a continuing breach of the agreement, surely the repudiator will be able to effect this in practice when the other party has not yet accepted or acted on the repudiation, or is perhaps still considering his or her options, or is not yet aware of the repudiation. Can it be repudiation if the other party is unaware? Hutchison *Law of Contract* 301 doubts if this will be possible, and Lubbe (1996) *Stell LR* 162 convincingly argues that this would be contrary to legal theory and the approach of South African courts. A factual approach to this question could simply be that in these circumstances the debtor has not yet effectively repudiated the agreement, or has not yet communicated his or her repudiation to the innocent party, which of course would mean that there is no repudiation yet.

<sup>301</sup> Van Huyssteen et al *Contract* 350-351; Hutchison et al *Law of Contract* 297-298; *Micaren* paras [11-12].

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offending party must, either by his or her conduct or expressly, refuse to perform.<sup>302</sup>

- In addition, the innocent party must be aware of the repudiation and must be under the impression that the offending party will not perform.<sup>303</sup>

The test for repudiation is an objective one, and therefore the intention of the repudiator is irrelevant.<sup>304</sup> Neither fault nor *mala fides* is required for repudiation.<sup>305</sup>

In practice, the advantage of relying on repudiation is that the innocent party is entitled to cancel the agreement without notice to the supplier.<sup>306</sup> The common-law remedy for repudiation could therefore benefit the consumer in circumstances where the supplier fails to perform.<sup>307</sup>

### 3.3.4 Where performance is impossible, or made impossible<sup>308</sup>

In general, where performance is objectively impossible<sup>309</sup> the contract does not come into existence, and the party or parties are not obliged to perform their respective contractual obligations.<sup>310</sup> However, when a party intentionally or negligently causes performance in terms of the agreement to become impossible, irrespective of whether he or she does so personally or allows someone else for whom he or she is legally responsible to do this, he or she can be held liable for breach of contract.<sup>311</sup> A party who guaranteed that performance is possible, or a party who assumed the risk of possibility of performance, can be held liable for breach of contract.<sup>312</sup>

When performance is made impossible by a party, the innocent party cannot claim specific performance, but can still perform his or her obligations and claim

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<sup>302</sup> For examples of parties' conduct that can be interpreted as repudiation, see Van Huyssteen et al *Contract* 351; Hutchison et al *Law of Contract* 297.

<sup>303</sup> Van Huyssteen et al *Contract* 350-351; Hutchison et al *Law of Contract* 297.

<sup>304</sup> Van Huyssteen et al *Contract* 352; Hutchison et al *Law of Contract* 297. See *Ponisammy and Another v Versailles Estates (Pty) Ltd* 1973 (1) All SA 540 (A) 548-554; *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 (2) SA 835 (A) 845-846; *B Braun Medical (Pty) Ltd v Ambasaam* CC 2015 (3) SA 22 (SCA) para [11].

<sup>305</sup> Hutchison et al *Law of Contract* 297; Sharrock *Business Transactions* 754.

<sup>306</sup> Van Huyssteen et al *Contract* 352; *Metalmil (Pty) Ltd v AECL Explosives and Chemicals Ltd* 1994 (3) SA 673 (A) 683; *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) 342.

<sup>307</sup> See the discussion in Ch 4 para 4.2.3.7.7.

<sup>308</sup> Where performance is made impossible, it is also known as prevention of performance. See Sharrock *Business Transactions* 754.

<sup>309</sup> Where performance is impossible at the moment the agreement is concluded, (initial impossibility). See Van Jaarsveld & Oosthuizen *Handelsreg* 147; De Wet & Van Wyk *Kontraktereg* 85; Sharrock *Business Transactions* 117-118.

<sup>310</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 147; Hutchison et al *Law of Contract* 205-206; *Marshall v LMM Investments* 1977 (3) SA 55 (W) hereafter *Marshall*.

<sup>311</sup> De Wet & Van Wyk *Kontraktereg* 142-144; Van Huyssteen et al *Contract* 519; *Mposelo v Banks* 1902 SC 370, 373; *Marshall* 58; *Stirling v Maitland and Another* [1861-73] All ER Rep 358.

<sup>312</sup> Sharrock *Business Transactions* 118.

damages.<sup>313</sup> The innocent party can also cancel the agreement and claim damages, even if the defaulter's performance is not yet due.<sup>314</sup>

### 3.4 General Remedies

#### 3.4.1 Introduction

Remedies for breach of contract are divided into two classes: those aimed at specific performance; and those aimed at rescission of the agreement. The former have been referred to as natural remedies as they are aimed at the results the parties intended when entering into the agreement.<sup>315</sup> The latter are referred to as extraordinary remedies as the aggrieved party is only entitled to them in exceptional circumstances.<sup>316</sup> Both classes of remedy can include a claim for damages.<sup>317</sup>

#### 3.4.2 Specific performance

The innocent party's normal remedies in *mora* are those aimed at fulfilling the agreement and extinguishing the consequences of non-performance in accordance with the maxim *pacta sunt servanda*.<sup>318</sup> Specific performance entitles a party to claim performance of the obligation(s) by the defaulter, and in addition, to claim damages for late performance, if applicable.<sup>319</sup>

In theory, parties to an agreement must perform simultaneously and performance by one is dependent on performance by the other. Therefore, in order to claim specific performance a party has either to perform or tender performance of his or her own obligations.<sup>320</sup> It is imperative that the plaintiff makes all necessary allegations, both when giving formal notice of his or her intention to claim specific

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<sup>313</sup> Van Huyssteen et al *Contract* 519; De Wet & Van Wyk *Kontraktereg* 174; Van Jaarsveld & Oosthuizen *Handelsreg* 147.

<sup>314</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 148. If a defaulter intends to make performance impossible, but has not yet done so, the other party can apply for an interdict to prevent him or her from doing so. See Van Jaarsveld & Oosthuizen *Handelsreg* 147; *Barnard v Thelander* 1977 (3) SA 932 (K) 938.

<sup>315</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 148; De Wet & Van Wyk *Kontraktereg* 195; Hutchison et al *Law of Contract* 310.

<sup>316</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 148; De Wet & Van Wyk *Kontraktereg* 195; Hutchison et al *Law of Contract* 310.

<sup>317</sup> De Wet & Van Wyk *Kontraktereg* 195; Van Jaarsveld & Oosthuizen *Handelsreg* 148; Hutchison et al *Law of Contract* 312.

<sup>318</sup> Hutchison et al *Law of Contract* 285; Bradfield *Christie's Law of Contract* 616-618; Van Huyssteen et al *Contract* 366-369; De Wet & Van Wyk *Kontraktereg* 195-196.

<sup>319</sup> De Wet & Van Wyk *Kontraktereg* 209-212. The creditor can in certain circumstances claim damages instead of performance.

<sup>320</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 150; De Wet & Van Wyk *Kontraktereg* 196; Hutchison et al *Law of Contract* 316; *Wolpert v Steenkamp* 1917 AD 493; *Ambrose & Aitken v Johnson & Fletcher* 1917 AD 327; *Geldenhuys & Neethling v Beuthin* 1918 AD 426, 438; *Koenig v Johnson & Co* 1935 AD 262, 276.



performance in terms of the agreement, and in litigation pleadings, as the defendant can otherwise raise the *exceptio non adimpleti contractus*.<sup>321</sup> This exception cannot be used in instances where the debtor has to perform over a period before the creditor can or must perform.<sup>322</sup> An example of this is the payment in instalments of a purchase price where the debtor is required to make a number of payments, and is in default in respect of an initial payment or instalment in an on-going series of payments, before the creditor can transfer the *merx* after full payment. In such a case, the creditor clearly need not tender performance of his or her obligation(s). Another example is when the obligation is not related to the defendant's claim<sup>323</sup> or where the plaintiff is excused from performance.<sup>324</sup>

Simultaneous performance can present problems in practice, and third parties sometimes have to be used to effect payment or delivery of the *merx*.<sup>325</sup> In cases of partial performance, the *exceptio non adimpleti contractus* can be raised in respect of the outstanding performance.<sup>326</sup> In cases of divisible performance this exception can be raised in respect of only a *pro rata* part of the claim.<sup>327</sup> The *exceptio non adimpleti contractus* is a defence which can be used against a party who claims performance, although he or she has not yet performed his or her corresponding obligations. In theory, the party who receives full compensation must deliver full performance of his or her obligations, minus damages in respect of the faulty or incomplete performance. In practice, a plaintiff who has not performed in full is not permitted to claim counter-performance, but should be able to claim counter-performance minus damages or costs to complete the performance, based on the principles of unjust enrichment.<sup>328</sup>

A court can undoubtedly enforce a contractual obligation to make payment against a debtor, and allow an unpaid creditor to excuss a debtor in arrears.<sup>329</sup> This right is

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<sup>321</sup> Exception on the ground that the plaintiff is also in default, Hiemstra & Gonin *Drietalige Regswoordeboek* 187; De Wet & Van Wyk *Kontraktereg* 196-208; Van Jaarsveld & Oosthuizen *Handelsreg* 150; Hutchison et al *Law of Contract* 316.

<sup>322</sup> De Wet & Van Wyk *Kontraktereg* 198; Hutchison et al *Law of Contract* 318.

<sup>323</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 151.

<sup>324</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 151.

<sup>325</sup> Hutchison (2013) *Stell LR* 1-29; Hutchison et al *Law of Contract* 317. For example, in transfers of immovable property, the purchaser normally arranges for bank guarantees to be issued that are paid to the seller on date of registration. See Van Jaarsveld & Oosthuizen *Handelsreg* 151; De Wet & Van Wyk *Kontraktereg* 199.

<sup>326</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 151; Hutchison et al *Law of Contract* 318-319.

<sup>327</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 151; Hutchison et al *Law of Contract* 319.

<sup>328</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 151-152; Hutchison et al *Law of Contract* 319; *Hauman v Nortje* 1914 AD 293, 304-305.

<sup>329</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 155; Van Huyssteen et al *Contract* 369; De Wet, Joubert and Bradfield argue convincingly that courts have erred in holding that they always have a discretion to refuse an order for specific performance where in their opinion it would be unreasonable to order the debtor to make payment instead of paying damages caused by non-performance. De Wet & Van Wyk *Kontraktereg* 210-211; Joubert argues that the creditor can either insist on the performance due, or can agree to another performance in place of the original, but, he argues these are two different remedies for different circumstances. Joubert (1977) *De Jure* 29;

not absolute – where performance is subjectively and objectively impossible, courts will not make the order.<sup>330</sup>

Van Huyssteen notes that after the *Benson v SA Mutual Life Assurance Society*<sup>331</sup> judgment, courts are more inclined to award orders for specific performance.<sup>332</sup> In this case, the Appeal Court was adamant that parties to an agreement were entitled to specific performance, save in exceptional cases.<sup>333</sup> Another school of thought contends that it is accepted that courts have a general discretion to order specific performance.<sup>334</sup> This point of view appears to reflect court practice and therefore reflects the true position, despite compelling arguments to the contrary.

There are no hard and fast rules as to when a court will refuse to order specific performance, but the court will take all the circumstances in a case into account before making such an order.<sup>335</sup> The following guidelines have been identified as instances when a court will not order specific performance:

- When the order will encumber the debtor disproportionately to the advantage of the creditor.<sup>336</sup>
- Where the court cannot ensure performance of the obligation.<sup>337</sup> However, where the court has jurisdiction it will be able to enforce the order and disputes can be resolved by the relevant court.<sup>338</sup>
- Where the contract in question is an employment contract or other contract for personal services.<sup>339</sup> Where the contractual relationship is not

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Van Jaarsveld & Oosthuizen *Handelsreg* 159 n 181; Bradfield *Christie's Law of Contract* 618-619; *Manasewitz v Oosthuizen* 1914 CPD 328; *SA Harness Works v SA Publishers* 1915 CPD 43; *Carpet Contracts v Grobler* 1975 (2) SA 436 (T) 441. In respect of obligations to transfer property, deliver the *merx*, or other specific performance, it is clear that such performance can be enforced. The innocent party should be entitled to specific performance, and the court's discretion is limited – *Farmers Co-op Society v Berry* 1912 AD 343, 350.

<sup>330</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 155; Van Huyssteen et al *Contract* 370.

<sup>331</sup> 1986 (1) SA 776 A (*Benson*).

<sup>332</sup> Van Huyssteen et al *Contract* 370.

<sup>333</sup> Hutchison et al *Law of Contract* 321; Van Huyssteen et al *Contract* 370, *Benson* 782-783; more or less in the same vein Hutchison and Du Bois write that a court will not easily interfere with the creditor's right to specific performance, see Du Bois et al *Wille's Principles* 873. See the position in Singapore, Ch 5 para 5.3.2.7.

<sup>334</sup> Hutchison et al *Law of Contract* 323; Van Jaarsveld & Oosthuizen *Handelsreg* 156; *Haynes v King Williamstown Municipality* 1951 (2) 371(A) 371, 378 (*Haynes*).

<sup>335</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 156; Bradfield *Christie's Law of Contract* 621-624. Hutchison et al *Law of Contract* 321 contend that these rules now virtually have 'rule of law' status. See too *Haynes* 381.

<sup>336</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 156; Hutchison et al *Law of Contract* 323; Du Bois et al *Wille's Principles* 873; *De Villiers v Kalson* 1928 EDL 217, 226; *Haynes* 381.

<sup>337</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 156.

<sup>338</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 156-157; Du Bois et al *Wille's Principles* 875.

<sup>339</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 156-157; Hutchison et al *Law of Contract* 321, 323; Bradfield *Christie's Law of Contract* 624-625; *Schierhout v Minister of Justice* 1926 AD 99, 107.

a personal one, courts will not necessarily refuse an order for specific performance.<sup>340</sup>

- Where the court is of the opinion that damages will provide the creditor with sufficient compensation.<sup>341</sup>
- Where the agreement does not stipulate the parties' obligations with absolute clarity.<sup>342</sup>

Where the court orders specific performance, related orders can also be made to ensure performance of the obligation(s).<sup>343</sup> If no related order is made the creditor will have the normal remedies at his or her disposal, for example, execution, a warrant of arrest for contempt of court, or an order for damages in lieu of performance. In practice, it is advisable that creditors request alternative remedies to specific performance in their pleadings.

### 3.4.3 *Rescission or cancellation of the agreement*

A contracting party is only permitted to rescind the agreement in extraordinary circumstances,<sup>344</sup> although there is no obligation on the innocent party to cancel an agreement – even if he or she has the right to do so, he or she can still elect to proceed in terms of the agreement.<sup>345</sup> Such a decision will be deemed an abandonment of the right to cancel if he or she is shown to have been aware of this right. An innocent party exercises his or her right to cancel an agreement by communicating this intention to the defaulter. Mere communication by the innocent party that he or she is considering cancellation, or a threat to cancel, does not amount to cancellation.<sup>346</sup> Cancellation without having gained the right thereto by way of notice of intention to cancel in terms of the agreement, will not be effective.<sup>347</sup>

The consequence of rescission or cancellation is that the obligation to perform in terms of the agreement falls away. In the case of divisible agreements, rescission of one part of the agreement will not affect the remainder of the agreement. After rescission, both parties are entitled to the return of their respective performances. In certain circumstances, a party may also be entitled to damages, an aspect to which I now turn my attention.

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<sup>340</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 157; Hutchison et al *Law of Contract* 323.

<sup>341</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 113. This should be regarded as a contentious statement, see Du Bois et al *Wille's Principles* 874; *Benson*.

<sup>342</sup> Bradfield *Christie's Law of Contract* 626; Du Bois et al *Wille's Principles* 874-875.

<sup>343</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 158.

<sup>344</sup> De Wet & Van Wyk *Kontraktereg* 215.

<sup>345</sup> De Wet & Van Wyk *Kontraktereg* 216.

<sup>346</sup> De Wet & Van Wyk *Kontraktereg* 218.

<sup>347</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 115.

#### 3.4.4 Damages

In a nutshell, the purpose of damages is to place a party in the position he or she would have been in had the other party performed in terms of the agreement.<sup>348</sup> Courts apply the following general rules when calculating damages:<sup>349</sup>

- Damages are not awarded merely because there has been a breach of contract. A party must prove the damages claimed.<sup>350</sup> *Mora* interest is an exception and need not be proved.<sup>351</sup>
- Only pecuniary loss based on breach of contract can be claimed. Sentimental damages or satisfaction can only be claimed in delict.<sup>352</sup> While the same act can lead to breach of contract and delict, this does not permit the court to award moral damages for a claim based on breach of contract.<sup>353</sup> For contract purposes, damages are the damages affecting the party's estate, irrespective of their origin.<sup>354</sup>
- For purposes of calculation of damages the party's financial position is compared to the position he or she would have been in had proper performance taken place.<sup>355</sup>
- In this calculation, the true financial position is considered, and if breach of contract had a positive effect, this will also be taken into account.<sup>356</sup>
- The damages must be a consequence of the breach. The *nexus* between the alleged breach and damages suffered will be considered.<sup>357</sup>
- In the event of damages caused by breach, the plaintiff will not be able to claim his or her damages if:

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<sup>348</sup> Kaser *Roman Law* 167-171; Potgieter et al *Skadevergoedingsreg* 1, 189-190, 198, 439; Du Bois et al *Wille's Principles* 882-883; Van Jaarsveld & Oosthuizen *Handelsreg* 171; De Wet & Van Wyk *Kontraktereg* 222; Van Huyssteen et al *Contract* 134, 415; Bradfield *Christie's Law of Contract* 643-647; Hutchison et al *Law of Contract* 230; Sharrock *Business Transactions* 760.

<sup>349</sup> See Potgieter et al *Skadevergoedingsreg* 82-90 and 349-378 for a general discussion of the principles for the calculation of damages based on breach of contract.

<sup>350</sup> Potgieter et al *Skadevergoedingsreg* 351; Hutchison et al *Law of Contract* 334; Sharrock *Business Transactions* 760. There is debate on exactly how to calculate the damages, depending on whether the plaintiff has to pay repair costs, or whether an estimate must be made using the market value approach. The market value approach is criticised because a loss can have consequences beyond market value. See *Kahn v Beirowski* 1933 TPD 43, 46-47; and Van Huyssteen et al *Contract* 420.

<sup>351</sup> Hutchison et al *Law of Contract* 344-346; Van Huyssteen et al *Contract* 421-422.

<sup>352</sup> Potgieter et al *Skadevergoedingsreg* 351.

<sup>353</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 117; Hutchison et al *Law of Contract* 334; *Jockie v Meyer* 1945 AD 354, 368.

<sup>354</sup> Van Jaarsveld & Oosthuizen *Handelsreg* 117; Hutchison et al *Law of Contract* 334; Van Huyssteen et al *Contract* 400.

<sup>355</sup> Potgieter et al *Skadevergoedingsreg* 184-185, 351; Hutchison et al *Law of Contract* 334-335.

<sup>356</sup> Hutchison et al *Law of Contract* 336; Sharrock *Business Transactions* 761; Van Huyssteen et al *Contract* 399-401.

<sup>357</sup> Potgieter et al *Skadevergoedingsreg* 351; Hutchison et al *Law of Contract* 337-340; Sharrock *Business Transactions* 762; Van Huyssteen et al *Contract* 398, 402-403.

- the damages suffered could have been, or were indeed foreseen;<sup>358</sup>
- the damages could have been prevented had he or she acted with reasonable care.<sup>359</sup>
- Damages are awarded as a monetary value and can only be claimed once.<sup>360</sup>

I now turn to the termination of agreements before concluding Chapter 3.

### 3.5 Termination

When both parties have fulfilled their respective duties in terms of an agreement, the contract with all its obligations is discharged.<sup>361</sup> This can also take place by way of merger, effluxion of time,<sup>362</sup> set-off, release, notice, novation, compromise, impossibility of performance, prescription, insolvency, rehabilitation, an agreement to terminate, and, in the case of a personal obligation, by death.<sup>363</sup>

### 3.6 Conclusion: Chapter 3

The common-law of contract and the *essentialia* thereof are governed by Roman law principles, the texts of Roman-Dutch writers, and a wealth of South African case law incorporating English law principles and dating back to the 1800s. Breach of contract, rescission, specific performance, and damages are equally well regulated by principles, maxims, exceptions, and sources to promote and ensure the fair and reasonable treatment of parties when their agreement is breached and/or rescinded. These principles have developed over centuries and have been refined to provide fair treatment in almost every eventuality.

Adding value to these already well-developed fairness principles, are the beneficial effects of the Constitution, the Bill of Rights, and the principle of ubuntu. As shown in the discussion above, there are shortcomings in some areas of the common law, mainly in the form of contradictory judgments and the incorrect interpretation of statutes and the Roman and Roman-Dutch principles. But the common law remains

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<sup>358</sup> This aspect is controversial as writers have criticised the courts' approach to the stage at which foreseeability is judged: either at the time of entering into the agreement, or when the breach takes place. See Hutchison et al *Law of Contract* 338; De Wet & Van Wyk *Kontraktereg* 226-229; Van Huyssteen et al *Contract* 413; *Schatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) 551.

<sup>359</sup> Hutchison et al *Law of Contract* 340; Sharrock *Business Transactions* 763-764; Van Huyssteen et al *Contract* 408-409; *North and Son (Pty) Ltd v Albertyn* 1962 (2) SA 212 (A) 215-219.

<sup>360</sup> Potgieter et al *Skadevergoedingsreg* 2-3, 23; Van Jaarsveld & Oosthuizen *Handelsreg* 175.

<sup>361</sup> Du Bois et al *Wille's Principles* 829; Hutchison et al *Law of Contract* 310.

<sup>362</sup> Also see the discussion by Mudzviti (2018) August *De Rebus* 18-19 on the approach of courts in the case of contracts with an indefinite term.

<sup>363</sup> Hutchison et al *Law of Contract* 378-390; Du Bois et al *Wille's Principles* 829-858; De Wet & Van Wyk *Kontraktereg* 251-311; Van Jaarsveld & Oosthuizen *Handelsreg* 183.

## South Africa: The common-law position of consumers under fixed-term contracts

a sophisticated and equitable contract-law regime that aims to protect both parties in equal measure, and allows the courts a discretion to develop the law within the bounds of the Constitution, ubuntu, and public policy.

The main shortcomings of the common-law contract system, in general, and also in relation to fixed-term contracts under section 14 of the CPA, are that courts have delivered conflicting judgments, and there are conflicting views amongst lawyers, academics, and judges on various aspects, for example:

- the parole evidence rule;
- the principle of *pacta servanda sunt*;
- freedom of contract, its extent, and whether it is still relevant;
- penalty clauses;
- exemption clauses;
- errors, and when these can be classified as material;
- inconsistent application of principles and rules by different courts and judges, leading to a lack of predictability and legal certainty;
- rarely used and not well known remedies or clauses which could have benefitted the parties;<sup>364</sup>
- given the basis of the common law in precedents establishing the exact position is time consuming while legislation lends itself to relatively easy determination; and finally,
- common law has neither anticipated nor kept pace with technological advances – this could, of course, apply equally to legislation.

The strengths of the common-law of contracts in general, including fixed-term contracts in terms of section 14 of the CPA are:

- Lord Tomlin lauded the virtues of the common law in the 1934 judgment, *Pearl Assurance Co v Union Government*,<sup>365</sup> the terms which ring true to today:  
‘In the first place the questions to be resolved are questions of Roman Dutch law. That law is a virile system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organized society.’
- In *Van Heerden and Others NNO v Queens Hotel (Pty) Ltd and Others*<sup>366</sup> the court held that common-law rights are to be guarded jealously as they are less likely to be affected by changes in policy, politics, and fancies of the legislature.
- In addition, and as a consequence of the above characteristic, courts have a discretion in each and every case to look at the facts objectively

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<sup>364</sup> For instance, paras 3.2.11 and 3.2.13.

<sup>365</sup> 1934 AD 560, 563.

<sup>366</sup> 1973 (2) SA 14 (RA) 23.

and apply or develop the law in conjunction with constitutional principles and ubuntu, to ensure fairness.

- The Constitutional Court holds the common law in high regard, and set rules for its development in *Mighty Solutions*<sup>367</sup> which have resulted in predictability in the development of the common law.
- The protective measures are continuous, starting during the negotiation stages of the agreement, continuing throughout all stages of its duration until termination, and on occasion continuing even thereafter – eg, in the case of warranties.
- Parties have freedom of contract, so bringing both *pacta servanda sunt* and *caveat scriptor* into operation. This has both advantages and disadvantages.<sup>368</sup>
- The protection afforded contracting parties under the common law is equitable and covers both parties in equal measure.
- Finally, the checks and balances in the common-law system have developed and improved over centuries in different jurisdictions, and are tried and tested for fairness, reasonableness, and justice. In *Mighty Solutions*, Van der Westhuizen J emphasised that '[s]ome of the lessons gained from human experience over the ages are timeless and have passed the logical and moral tests of time'.<sup>369</sup>

Having considered the relevant common-law contractual principles that also form the foundation for consumer agreements under the CPA, I turn in Chapter 4, to examine the provisions in the CPA relevant to fixed-term contracts to establish whether parties are better protected by these provisions than at common law, especially when the supplier defaults or is guilty of non-performance.

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<sup>367</sup> See para 3.1.1 above.

<sup>368</sup> See the discussion in Ch 2 para 2.4.

<sup>369</sup> *Mighty Solutions* para [37]. See the discussion of this judgment and the requirements set in the judgment for the development of the common law in para 3.1.1 above.

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## **CHAPTER FOUR: South Africa: The position of consumers under fixed-term agreements regulated by the Consumer Protection Act 68 of 2008**

### *4.1 Introduction*

South Africa entered the realm of modern consumer protection legislation on 31 March 2011 with the newly enacted Consumer Protection Act 68 of 2008 (CPA).<sup>1</sup> In this chapter, I provide background to put the study in perspective, briefly discuss the history of consumer protection legislation in South Africa, the move to implement effective legislation, and the aims and focus of the CPA and factors that influence consumer legislation. I then analyse and critique the definitions and the provisions of section 14, including the types of agreement affected by the section – eg, lease agreements, time-share, mandates, and sales of immovable property. Thereafter, I focus on section 2(10) of the CPA which retains the common-law rights, before highlighting other sections in the CPA and relevant principles and concepts that could have a secondary effect on fixed-term agreements. Finally, I discuss case law and transformative constitutionalism.

The purpose of this chapter is not to provide an exhaustive study of the entire CPA, or of all agreements concluded under its provisions. Only aspects directly relevant to the parties' respective positions under fixed-term contracts in terms of section 14 of the CPA, when compared to their common-law positions are considered. A comparison between the common-law position and the position under the CPA is relevant as section 2(10) of the CPA provides that no provision in the CPA must be interpreted so as to preclude a consumer from exercising any right afforded in terms of the common law.

### *4.2 Consumer protection in South Africa*

#### *4.2.1 History and background*

In 1926 South Africa adopted its first consumer protection measures under the Usury Act 37 of 1926.<sup>2</sup> In 1942 the Hire-Purchase Act was enacted to regulate hire-purchase agreements,<sup>3</sup> followed by the Sale of Land on Instalments Act in 1971.<sup>4</sup> The first legislation specifically named and intended to regulate consumer matters was the Consumer Affairs (Unfair Business Practices) Act 71 of 1988. This Act relied on consumers laying complaints concerning acts or practices they regarded as unfair business practices with the Consumer Affairs Committee. If the complaint was successful, the business practice would be declared unfair. The legislation was

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<sup>1</sup> For an article investigating whether South Africa needed consumer legislation or if non-government intervention would be preferable, see Woker (2010) *Obiter* 217-218.

<sup>2</sup> The purpose of this legislation was to limit the charging of interest. This Act was replaced in 1968 by the Limitation and Disclosure of Finance Charges Act 73 of 1968, amended and renamed in 1980 to the Credit Agreements Act 75 of 1980, amended in 1986, and more recently replaced by the National Credit Act 34 of 2005 (hereafter the NCA). See Otto (2010) *Fundamina* 257, 260-262.

<sup>3</sup> This Act has since been replaced by the Credit Agreements Act 75 of 1980, and by the NCA.

<sup>4</sup> Act 72 of 1971, now replaced by the Alienation of Land Act 68 of 1981 (hereafter ALA).

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neither effective nor frequently used, but was the direct precursor to the Consumer Protection Act (CPA).<sup>5</sup> The National Credit Act,<sup>6</sup> which regulates the consumer-credit industry improved the position under the Usury Act and Credit Agreements Act, but still has serious shortcomings, mainly in the definition of key terms.<sup>7</sup> However, overall, the NCA should be regarded as an improvement on earlier legislation.<sup>8</sup>

4.2.2 *The effect of the Constitution, the Draft Green Paper and the Law  
Commission Report on the consumer policy framework*<sup>9</sup>

4.2.2.1 *Introduction and background*

South Africa is a constitutional democracy—the Constitution is the supreme law as it specifically states that all conduct or law inconsistent with the Constitution is invalid.<sup>10</sup> Section 7 of the Constitution provides that the Bill of Rights<sup>11</sup> is the cornerstone of democracy in South Africa.<sup>12</sup> The Constitutional Court's decisions are binding on all other courts,<sup>13</sup> and all legislation is subject to the provisions of the Constitution.

Although the Bill of Rights<sup>14</sup> does not expressly refer to consumer rights, the following sections may be relevant to consumers' rights:<sup>15</sup>

- Section 7(1): Right to dignity, equality, and freedom.
- Section 8(1): Bill of Rights applies to all law, it binds the legislature, the executive, the judiciary, and all organs of state.
- Section 8(3): Courts must develop the common law to give effect to the Bill of Rights.
- Section 9: Equality.
- Section 10: Human dignity.
- Section 18: Freedom of association.
- Section 25(1): No one may be deprived of property.
- Section 32(1)(b): Access to information.
- Section 33: Just administrative action.

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<sup>5</sup> Naudé (2018) *JCP* 413.

<sup>6</sup> 35 of 2005 (hereafter the NCA).

<sup>7</sup> Otto (2010) *Fundamina* 257, 273. Some of the shortcomings have been addressed by the National Credit Amendment Act 19 of 2014. The National Credit Amendment Act 7 of 2019 has been signed into law but is not yet in operation.

<sup>8</sup> Otto (2010) *Fundamina* 273.

<sup>9</sup> General Notice 1957 in *Government Gazette* (hereafter GG) 26774 of 9 September 2004 (*Green Paper*).

<sup>10</sup> Section 2 of the Constitution.

<sup>11</sup> Chapter 2 of the Constitution.

<sup>12</sup> Section 7(1).

<sup>13</sup> See Ch 3 para 3.1.1.

<sup>14</sup> Chapter 2 of the Constitution.

<sup>15</sup> See Barnard & Kok (2015) *THRHR* 1-23 on the consumer's right to equality.

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- Section 34: Access to courts.
- Section 36: Limitation of rights.
- Section 39: Promotion of the values of the Bill of Rights by courts, Tribunals, or forums.

Part A of Schedule 4 to the Constitution refers to functional areas over which national and provincial legislatures have concurrent jurisdiction, and expressly identifies consumer protection as one of these areas. This is the only direct reference to consumer protection in the Constitution.<sup>16</sup>

As indicated below, one of the primary aims of the CPA is to transform society and the economy to correct the injustices of the past.<sup>17</sup> Although neither the preamble to the CPA, nor its section 3, expressly mentions the Constitution, there can be little doubt that this objective must be realised through transformative constitutionalism.<sup>18</sup>

#### 4.2.2.2 *The Law Commission Report*

Upon realising the importance of consumer protection and the number of consumer complaints against unconscionable terms or agreements, the Law Commission<sup>19</sup> was instructed to report on clauses and contracts that were unreasonable and unjust. The Commission recommended that courts rectify contracts found to be unconscionable and unjust.<sup>20</sup> It recommended the Working Committee's<sup>21</sup> proposals for the identification of criteria for fairness in contracts should not be accepted, and that this aspect should be addressed in the proposed specific legislation. Instead of proposing a Bill addressing specific business practices, two Bills were proposed:

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<sup>16</sup> Brits (2017) *TSAR* 470, 472.

<sup>17</sup> Preamble to the CPA, s 3(1).

<sup>18</sup> Transformative constitutionalism is the development of the common law in accordance with the principles of the Constitution. For more information see Van der Walt (2006) *Fundamina* 1-47; Moseneke (2009) *Stell LR* 10 12-13; Tladi (2002) *De Jure* 306-317; Bauling & Nagtegaal (2015) *De Jure* 149, 151; and Reddy & Rampersad (2012) *Afr J Bus Manage* 7412. See also para 4.4 below for more details.

<sup>19</sup> The Law Commission is now known as the South African Law Reform Commission. See [www.justice.gov.za/salrc](http://www.justice.gov.za/salrc) (date of use: 18 March 2020). The working committee is considered the executive committee of the Commission.

<sup>20</sup> South African Law Commission Report, Project 47, Unreasonable Stipulations in Contracts and the Rectification of Contracts (April 1998) (hereafter *Law Commission Report*). In the summary of findings, the Commission first raised concern with the second leg of their brief, rectification of contracts, as that would lead to legal uncertainty and could potentially alienate the South African economy from foreign investment. It proceeded, however, to conclude that legal certainty was not necessarily the only aim of the law, and that unjust and unconscionable contract terms should be addressed by specific legislation, perhaps supplemented by codes of conduct, as it felt that codes of conduct alone were not sufficient. The Commission recommended an ombudsman be appointed to deal with unreasonable, oppressive, and unconscionable contract terms in standard-form contracts. The Law Commission also recommended that evidence be allowed when a contract is interpreted (whether the contract's wording is ambiguous or not) if such evidence assists to interpret the contract. *Law Commission Report* 3 192-207. For a discussion of parol evidence see Ch 3 para 3.2.9, Ch 5 para 5.3.2.9.1, and Ch 6 para 6.3.6.

<sup>21</sup> See [www.justice.gov.za/salrc/objects.htm](http://www.justice.gov.za/salrc/objects.htm) (date of use: 18 March 2020).

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one on the control of unreasonable, unconscionable, or oppressive contracts or terms;<sup>22</sup> and the other on unfair contractual terms.<sup>23</sup>

#### 4.2.2.3 *The Green Paper*

Following the report by the Law Commission, the *Draft Green Paper* on the Consumer Policy Framework was published by the Department of Trade and Industry in 2004.<sup>24</sup> The proposed policy had the following aim: 'Driving Competitiveness: Consumer confidence and business excellence'.<sup>25</sup> The most pressing problems faced by the economy and vulnerable consumers were the negative effects of apartheid, the fact that a high percentage of the population was poor and illiterate, incidences of human rights abuses, and continued socio-economic disparity.<sup>26</sup>

A milieu was proposed where consumers' rights and responsibilities would flourish, as that would be in the best interest of business and consumers and would free the market of iniquitous dealers.<sup>27</sup> This would be accomplished by providing consumers, especially those previously disadvantaged, with well-advised and reasonable procedures to effect redress by way of accessible, flexible legislation and accessible infrastructure to improve access to affordable legal aid when required.<sup>28</sup> The aim was to provide South Africa with comprehensive consumer legislation on par with international legislation and in line with UN guidelines.<sup>29</sup> The lack of an effective consumer movement which actively campaigned for the rights and protection of consumers was lamented,<sup>30</sup> as well as the lack of customer responsiveness.<sup>31</sup>

The *Green Paper* acknowledged the importance of effective competition law measures to ensure consumers pay fair prices in a competitive market environment.<sup>32</sup> Of particular importance for this thesis, is the reference in the *Green Paper* to the inequality of bargaining power between consumers and suppliers,<sup>33</sup> and the reference in consumer legislation to a general provision regarding unconscionable contract terms, and the use of plain language to assist consumers

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<sup>22</sup> *Law Commission Report* 208-218.

<sup>23</sup> *Law Commission Report* 219-220. For further information and criticism on the report and the proposed legislation, see Hefer (2000) *TSAR* 142-154; Jamneck (1997) *TSAR* 637-647; Van der Walt (2000) *TSAR* 33-51.

<sup>24</sup> DTI *Green Paper* published in General Notice 1957 in GG 26774 of 9 September 2004. A final version of this document was never released.

<sup>25</sup> *Green Paper* 4.

<sup>26</sup> *Green Paper* 7.

<sup>27</sup> *Green Paper* 7.

<sup>28</sup> *Green Paper* 7.

<sup>29</sup> See Ch 2 para 2.6.

<sup>30</sup> *Green Paper* 10.

<sup>31</sup> Customer responsiveness is when businesses provide good customer service, handle customers' complaints efficiently, and in general provide good value for money to their customers. *Green Paper* 7. Also, see Scott *LLD* 7.

<sup>32</sup> *Green Paper* 18-19.

<sup>33</sup> *Green Paper* 33; also see the discussion on inequality of bargaining power in Ch 2 para 2.5.



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with low literacy levels.<sup>34</sup> In addition, access to redress was also emphasised.<sup>35</sup> To achieve this goal a consumer commission was proposed as well as a consumer Tribunal to provide redress to consumers when needed.<sup>36</sup>

### 4.2.2.4 Concluding remarks: *The Constitution, the Law Commission Report, the Green Paper, and Consumer Policy Framework*

In principle, the findings and proposals in the Law Commission Report and the *Green Paper* cannot be faulted as they support both South African constitutional values and well-established international consumer-law principles.<sup>37</sup> The CPA and its relevant sections will now be analysed to evaluate if the goals and purposes set in these documents were achieved in respect of the regulation of fixed-term contracts.

### 4.2.3 *The Consumer Protection Act 68 of 2008*<sup>38</sup>

#### 4.2.3.1 *Introduction and background*

The turn of the century marked a new era in consumer protection and since then various Acts aimed at protecting consumers have been adopted.<sup>39</sup> Before the CPA, there were no effective legislative consumer protection measures. The Consumer Affairs Act (Unfair Businesses Act)<sup>40</sup> was inadequate as its measures were not pro-

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<sup>34</sup> *Green Paper* 34.

<sup>35</sup> *Green Paper* 40. The importance of the 'Batho Pele Framework' was emphasised in the executive summary of the *Green Paper*. See <http://localgovernmentaction.org.dedi6.cpt3.host-h.net/content/batho-pele-principles> (date of use: 6 February 2019). These principles relate to the Constitution and entitle citizens to adequate standards of consultation, service standards, access, courtesy, information, openness and transparency, redress, and value for money. This framework provides consumers with effective mechanisms at local government level to handle complaints, and to provide assistance and recourse in cases of consumer abuse or complaints. See *Green Paper* 11.

<sup>36</sup> *Green Paper* 43-48.

<sup>37</sup> For example, unequal bargaining position as described by Kessler. See Ch 2 para 2.5.3; Naudé & Eiselen *Commentary* Introduction 20 para 32.

<sup>38</sup> The CPA.

<sup>39</sup> Electronic Communications and Transactions Act 25 of 2002; the National Credit Act 34 of 2005 (NCA); the CPA in 2008 which came into effect 2011, (certain provisions of the CPA relating to product liability came into effect on 29 April 2010); the Protection of Personal Information Act 4 of 2013 (POPI Act); Rental Housing Act 50 of 1999; Financial Sector Regulation Act 9 of 2017; Financial Advisory and Intermediary Services Act 37 of 2002; and the Competition Act 89 of 1998, to name but a few. Future consumer protection legislation includes the envisaged Draft Housing Consumer Protection Bill, 2019, see Government Notice 1118 in GG 42669 of 30 August 2019.

<sup>40</sup> 71 of 1988, the Consumer Affairs Act (Unfair Businesses Act) was adopted to regulate business practices and operated on a customer complaint base. Woker describes this as an enabling, rather than prescriptive Act as it does not prohibit conduct and, in addition, the Committee did not operate as envisaged because it did not have sufficient resources or the capacity necessary to operate effectively. In addition, Woker investigated the possibility of having industry codes to regulate the position of the consumer. Although regarded as successful in some instances, they were not officially implemented, although still recognised by the DTI as being potentially significant. See Woker (2010) *Obiter* 21.

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active,<sup>41</sup> or in line with constitutional aspirations. They failed to protect consumers, were complaint-based,<sup>42</sup> lagged behind international trends, and contained ineffective powers of redress.<sup>43</sup> Although the common law was used extensively in consumer cases, it was seen as inadequate in the following regards:<sup>44</sup>

- improper consent to agreements was provided by consumers;<sup>45</sup>
- misleading information was provided by suppliers to convince consumers to enter into agreements;<sup>46</sup>
- contract terms were unfair;<sup>47</sup>
- the quality of goods was not always adequate and goods were often found to be defective;<sup>48</sup> and
- with the developments in technology, even sophisticated and highly educated consumers were facing problems when confronted with technologically or scientifically advanced products and devices.<sup>49</sup>

It is also submitted that the common law is not applied to a large extent in consumer law judgments, as litigation based on common-law principles is expensive because of the cost of legal representation, and cases normally take a long time to finalise. As a result, many consumers cannot afford legal representation and litigation based on the common law, especially where the disputed amounts are relatively small. Therefore, the country was in need of well-balanced measures to protect the interests of both business and consumers.<sup>50</sup>

When the Draft Consumer Protection Bill was published, it was regarded as controversial by certain commentators.<sup>51</sup> Du Preez regards the Bill as wide and far-reaching, and she criticises the intelligibility of the Bill for consumers, as the language in the Bill is not user-friendly.<sup>52</sup> The purpose of the CPA is to provide

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<sup>41</sup> In this regard see Woker (2010) *Obiter* 219-221; Du Preez (2009) *TSAR* 63-64; Naudé (2018) *JCP* 413; Tennant *LLD* 89-92.

<sup>42</sup> Naudé (2018) *JCP* 411-434.

<sup>43</sup> Du Preez (2009) *TSAR* 64; Woker (2010) *Obiter* 230-231. In addition, it was also criticised as being fragmented by Jacobs et al (2010) *PELJ* 303.

<sup>44</sup> Woker (2010) *Obiter* 223.

<sup>45</sup> Woker (2010) *Obiter* 223.

<sup>46</sup> Woker (2010) *Obiter* 223.

<sup>47</sup> Woker (2010) *Obiter* 223.

<sup>48</sup> Woker (2010) *Obiter* 223 who concludes at 230 that consumer legislation was indeed a necessity.

<sup>49</sup> Woker (2010) *Obiter* 230.

<sup>50</sup> Woker (2010) *Obiter* 230.

<sup>51</sup> There were three draft versions of the Bill, the last published for commentary in May 2008. For comments on the Bill see Du Preez (2009) *TSAR* 58 and Jacobs et al (2010) *PELJ* 302.

<sup>52</sup> Most of the provisions are not of direct importance for the purpose of this thesis. A few that could be relevant are: discriminatory marketing, cooling-off periods; return of goods; plain and understandable language; written consumer agreements; unfair, unreasonable, or unjust contract terms; warranties; and price disclosures. In her preliminary comments on the Draft Consumer Protection Bill, Du Preez notes the Bill is not drafted clearly and is not easy to understand. This is ironic as one of the aims of the resulting Act is to ensure accessibility for consumers. See Du Preez (2009) *TSAR* 82.

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access to consumers from all income groups, regardless of socio-economic status and the fact that they live in remote areas, to goods and services.<sup>53</sup> Du Preez observes that the CPA Bill provides for consumers' 'entitlements', not for rights.<sup>54</sup>

With the publication of the Bill in 2008, the Department of Trade and Industry said one of the objectives of the policy was the harmonisation of South African consumer protection measures with international measures.<sup>55</sup>

#### *4.2.3.2 Purpose and aims of the CPA*

The CPA came into effect on 31 March 2011. It is interesting that there is no reference to the Constitution either in the preamble to the CPA or in section 3 which sets out its purpose.<sup>56</sup> The only references to the Constitution are in the definitions and in a few other sections.<sup>57</sup>

The preamble to the CPA provides the general policy and sphere of application of the Act – that apartheid and discriminatory legislation is recognised as a burden, and to have caused high levels of poverty, illiteracy, and other socio-economic inequalities.<sup>58</sup> Therefore, there is a need to fulfil the rights of previously disadvantaged people, promote their full participation in the economy as consumers, to protect consumers, ensure accessible transparent and efficient redress for exploited consumers, and to give effect to internationally recognised consumer rights. It recognises technological changes that bring new benefits, opportunities, and challenges and further acknowledges that it is desirable to promote a climate that supports and strengthens consumer rights and responsibilities, innovation, and performance. The CPA must promote the economic interests of consumers, promote access to information, protect consumers from hazards, provide effective redress, educate consumers, promote consumer activism and the freedom thereto, and finally, promote consumer participation in decision making and consumer interest-related matters.<sup>59</sup>

It is clear, despite the lack of express reference to the Constitution, that the CPA embraces the values and rights entrenched in the Bill of Rights. It covers consumer

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<sup>53</sup> The purpose of the NCA is similar to that of the CPA. However, Du Preez (2009) *TSAR* 63 warns that despite the commendable aims of the NCA and CPA, these Acts could have the opposite effect if overregulated and if placing such an additional administrative burden on financiers and suppliers alike, that it would not be worth their while to pursue the proposed agreements or business. Also see the discussion on the language used in the CPA para 4.3.5.

<sup>54</sup> This aspect is discussed in greater detail in para 4.3.5 below.

<sup>55</sup> This would, of course, primarily imply the UN Guidelines. See s 2(1)(a) of the CPA. Also see Ch 2 para 2.6.

<sup>56</sup> Unlike other legislation like the Companies Act 71 of 2008, where there is express reference to the Constitution in its preamble and in s 7 which sets out the purpose of the Act.

<sup>57</sup> A few examples are: s 1, s 5(2)(f), s 8(1), (2) and (4), ss 9(3) and (4)(a), section 81(2)(c), s 83(1), s 85 (2)(c) (ii), and ss 92(4) and 112(5).

<sup>58</sup> Reddy & Rampersad (2012) *Afr J Bus Manage* 7407.

<sup>59</sup> These general aims are described in more detail as part of the CPA in s 3 which I consider below.

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transactions that do not fall within the scope of either the NCA or the Financial Sector Conduct Authority legislation.<sup>60</sup>

Depending on the parties involved, the legal nature of the agreement, and applicable legislation, if any, consumer contracts are divided into three main categories:<sup>61</sup>

- Consumer transactions that fall within the scope of the CPA – eg, a 24-month agreement to purchase a cellphone coupled with a service agreement by a service provider.<sup>62</sup>
- Transactions covered by the NCA – eg, personal loans and bonds.
- Pure common-law transactions not covered by either of the above Acts – eg, an agreement to enter into a partnership that is covered by the common law.

Even though the CPA and the NCA apply to the first two classes of consumer agreement, the common law still forms the basis for all these agreements, including those regulated by legislation.<sup>63</sup>

Section 3 builds on the preamble to the CPA and sets out the purposes of the Act and how the CPA is to be implemented and interpreted.<sup>64</sup>

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<sup>60</sup> Previously (before 1 April 2018) known as the Financial Services Board. The Financial Services Board Act 97 of 1990 as amended by the s 66 of the Financial Services Laws General Amendment Act 45 of 2013. The Financial Sector Regulation Act 9 of 2017 has repealed the Financial Services Board Act. See Government Notice 853 in GG 41060 of 22 August 2017.

<sup>61</sup> Naudé & Eiselen *Commentary* Introduction 2.

<sup>62</sup> Certain transactions are covered by both the CPA and the NCA – eg, when a consumer purchases a car with a service agreement included, and obtains finance to pay the purchase price. The credit agreement is regulated under the NCA, while the CPA regulates the car (the goods) and the service agreement (the services). See paras 4.2.3.6.3 and 4.2.3.6.5 for the definitions of 'goods' and 'services'.

<sup>63</sup> Naudé & Eiselen *Commentary* Introduction 2.

<sup>64</sup> Section 3 provides:

- '(1) The purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by:-
- (a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable, and responsible for the benefit of consumers generally;
  - (b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers-
    - (i) who are low-income persons or persons comprising low-income communities;
    - (ii) who live in remote, isolated or low density population areas or communities;
    - (iii) who are minors, seniors or other similarly vulnerable consumers; or
    - (iv) whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented;
  - (c) promoting fair business practices;
  - (d) protecting consumer from -

#### 4.2.3.3 *The interpretation of the CPA*

Section 3 is significant in that the CPA must be interpreted to give effect to the purposes set out in section 3.<sup>65</sup> As such, section 3, which consists of two parts, forms an integral part of the CPA and its interpretation.<sup>66</sup> Therefore, the CPA is not interpreted only by making use of the normal rules of legal interpretation.<sup>67</sup> Delpont emphasises that when interpreting a statute, regard should not be limited to the literal meaning of the words, even if they are clear,<sup>68</sup> the purpose of the statute, its objectives, and the Constitution must also be considered.<sup>69</sup> Van Heerden and Barnard, too, emphasise the purposive interpretation the CPA<sup>70</sup> and the importance of section 3 of the Act.<sup>71</sup> This aspect was addressed in *Eskom Holdings Ltd v Halstead-Cleak*,<sup>72</sup> and *Transcend Residential Property Fund Ltd v Mati & Others*<sup>73</sup> which emphasise the importance of interpreting the CPA having account of the following factors:<sup>74</sup>

- the long title of the CPA;<sup>75</sup>
- the *Green Paper*;<sup>76</sup>
- section 2(1) of the CPA must be interpreted to give effect to the purposes in section 3 of the CPA;<sup>77</sup>

- 
- (i) unconscionable, unfair unreasonable, unjust or otherwise improper trade practices; and
  - (ii) deceptive, misleading, unfair or fraudulent conduct;
  - (e) improving consumer awareness and information and encouraging responsible and informed consumer choice and behavior;
  - (f) promoting consumer confidence, empowerment, and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism;
  - (g) providing for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and
  - (h) providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers.'

See Naudé & Eiselen *Commentary* 5, 1-5. Note that section 3(2) deals with the responsibilities of the Consumer Commission and falls outside the scope of this thesis.

<sup>65</sup> Section 2(1). Naudé & Eiselen *Commentary* 2-2-2-3.

<sup>66</sup> Du Preez (2009) *TSAR* 65 remarks that the purpose of the CPA is significant as s 3 provides that the Act must be interpreted to give effect to these purposes. See too Jacobs et al (2010) *PELJ* 305; Delpont (2014) *Obiter* 74. As mentioned, ss 3(2) deals with the responsibilities of the Consumer Commission and is not directly relevant for purposes of this thesis.

<sup>67</sup> Jacobs et al (2010) *PELJ* 305.

<sup>68</sup> See Delpont (2014) *Obiter* 65-69. Also see Du Preez (2009) *TSAR* 65; Jacobs et al (2010) *PELJ* 305.

<sup>69</sup> See the discussion in para 4.2.2.1 above.

<sup>70</sup> Van Heerden & Barnard (2019) *THRHR* 450.

<sup>71</sup> Van Heerden & Barnard (2019) *THRHR* 444, 449-450, 461; Sharrock (2010) *SA Merc LJ* 299.

<sup>72</sup> 2017 (1) SA 333 (SCA) (hereafter *Eskom*).

<sup>73</sup> 2018 (4) SA 515 (WCC) (hereafter *Mati*).

<sup>74</sup> The court relied on the decision in *Eskom* and *Natal Joint Municipal Pension Fund v Endumeni* 2012 (4) SA 593 (SCA) (hereafter *Endumeni*).

<sup>75</sup> *Mati* para [42].

<sup>76</sup> *Mati* para [43] referring to *Eskom*.

<sup>77</sup> *Mati* para [44].

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- section 5 of the CPA;<sup>78</sup>
- the definitions, preamble and purposes of the CPA.<sup>79</sup>

Section 2(2) provides that when interpreting the CPA, a person, court, Tribunal or the Commission must consider the following matters, namely appropriate foreign law, appropriate international conventions, declarations, or protocols on consumer protection, and decisions of the consumer court, the ombud, or an arbitrator which have not been set aside by superior courts.<sup>80</sup> In addition, the relevant decisions of the Commission and the Tribunal must also be considered.<sup>81</sup>

Section 4(4)<sup>82</sup> sets very strict rules for courts and Tribunals interpreting standard-forms, other contracts, and other documents prepared by, or on behalf of, the supplier. Section 4(4) provides that all standard-form contracts and contracts prepared by or on behalf of the supplier, must be interpreted by the Tribunal or court to benefit the consumer.<sup>83</sup> These rules include provisions on ambiguity,<sup>84</sup> restrictions and limitations in contracts, the way in which the documents was prepared and presented to the consumer, and the 'circumstances of the transaction or agreement'.<sup>85</sup> Section 4(4)(b)(iii) implies that the parol evidence rule does not apply in the circumstances provided for in the subsection.<sup>86</sup>

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<sup>78</sup> *Mati* para [47].

<sup>79</sup> *Mati* para [47].

<sup>80</sup> Naudé & Eiselen *Commentary* s 2(2), 2-6.

<sup>81</sup> The National Consumer Commission was established in terms of s 85 of the CPA and the Consumer Tribunal in terms of s 26 of the NCA.

<sup>82</sup> Section 4(4) provides that '[t]o the extent consistent with advancing the purposes and policies of this Act, the Tribunal or court must interpret any standard form, contract or other document prepared or published by or on behalf of a supplier, or required by this Act to be produced by a supplier, to the benefit of the consumer—

- (a) so that any ambiguity that allows for more than one reasonable interpretation of a part of such a document is resolved to the benefit of the consumer; and
- (b) so that any restriction, limitation, exclusion or deprivation of a consumer's legal rights set out in such a document or notice is limited to the extent that a reasonable person would ordinarily contemplate or expect, having regard to—
  - (i) the content of the document;
  - (ii) the manner and form in which the document was prepared and presented; and
  - (iii) the circumstances of the transaction or agreement.'

<sup>83</sup> The *contra proferentem* principle is now statutorily entrenched to protect the consumer who is in a lesser bargaining position. Also see the discussion in Ch 2 para 2.5 regarding inferior bargaining position.

<sup>84</sup> Section 4(4)(a).

<sup>85</sup> Section 4(4)(b).

<sup>86</sup> Section 4(4)(b)(iii) provides that the Tribunal or court must interpret the contract, document or standard form to benefit the consumer, taking into account the circumstances of the transaction or agreement. See the discussion in Ch 3 para 3.2.9 on the parol evidence rule, and also how the CPA affects the rule in para 4.3.2.7 below.

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The second part of section 3 sets out the responsibilities of the Consumer Commission to ensure the effective realisation of the purposes of the CPA and the enjoyment of consumer rights.<sup>87</sup>

#### 4.2.3.4 *The CPA's field of application*<sup>88</sup>

Section 5 of the CPA provides that the Act applies to:

- every transaction in South Africa not exempted by subsections 5(2), 5(3) and 5(4);<sup>89</sup>
- the promotion of goods or services, or to the supplier of goods or services;<sup>90</sup>
- goods provided or services performed in terms of a transaction covered by the CPA;<sup>91</sup>
- goods provided in terms of exempted transactions to the extent provided for in subsection 5(5)(1)(d);<sup>92</sup>
- unless an exemption applies;<sup>93</sup> and
- section 5(6) transactions are also regarded as a transaction.<sup>94</sup>

I shall now briefly mention the fundamental consumer rights protected by the CPA as background to the rest of this chapter.

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<sup>87</sup> This aspect will not be discussed as it falls outside the scope of this thesis.

<sup>88</sup> For more information on the application of the CPA relevant to the topic of this thesis, see Van Eeden & Barnard *Consumer Protection* 35-37; Sharrock *Business Transactions* 593-595; Kirby (2011) *Without Prejudice* 22; Melville & Palmer (2010) *SA Merc LJ* 272; Jacobs et al (2010) *PELJ* 301; *Four Wheel Drive Accessory Distribution CC v Rattan NO* 2019 (3) SA 451 (SCA); *Mati; Vouvoukis v Queen Ace CC t/a Ace Motors* 2016 (3) SA 188 (ECG).

<sup>89</sup> Section 5(1)(a) CPA.

<sup>90</sup> Section 5(1)(b) CPA.

<sup>91</sup> Section 5(1)(c) CPA.

<sup>92</sup> Section 5(1)(d) CPA. Section 5(5) provides that although these transactions are exempt from the operation of the CPA, the goods, the importer, distributor and supplier or retailer will be subject to the provisions of ss 60 and 61 of the CPA. Section 60 deals with unsafe goods and s 61 deals with the liability of suppliers, retailers, importers and distributors when damage is caused by goods.

<sup>93</sup> Section 5(2) CPA.

<sup>94</sup> See s 5(6) of the CPA which provides that, '[f]or greater certainty, the following arrangements must be regarded as a transaction between a supplier and consumer, within the meaning of this Act:

- (a) The supply of any goods or services in the ordinary course of business to any of its members by a club, trade union, association, society or other collectivity, whether corporate or unincorporated, of persons voluntarily associated and organised for a common purpose or purposes, whether for fair value consideration or otherwise, irrespective of whether there is a charge or economic contribution demanded or expected in order to become or remain a member of that entity;
- (b) a solicitation of offers to enter into a franchise agreement;
- (c) an offer by a potential franchisor to enter into a franchise agreement with a potential franchisee;
- (d) a franchise agreement or an agreement supplementary to a franchise agreement; and
- (e) the supply of any goods or services to a franchisee in terms of a franchise agreement.'

#### 4.2.3.5 Consumer rights<sup>95</sup>

Commentators regard Chapter 2 of the CPA which sets out the fundamental consumer rights, controversial.<sup>96</sup> The consumer rights referred to in Chapter 2 are:

- the right of equality;<sup>97</sup>
- the right to privacy;<sup>98</sup>
- the right to choose;<sup>99</sup>
- the right to disclosure and information;<sup>100</sup>
- the right to fair and responsible marketing;<sup>101</sup>
- the right to fair and honest dealing;<sup>102</sup>
- the right to fair, just and reasonable terms and conditions;<sup>103</sup>
- the right to fair value, good quality and safety;<sup>104</sup> and
- the supplier's accountability to consumers.<sup>105</sup>

These rights are in line with the seven rights in the UN Guidelines for consumer protection.<sup>106</sup>

Only the fundamental rights relevant to fixed-term contracts are discussed where applicable, as a complete analysis of the fundamental rights of consumers falls outside the scope of this thesis.

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<sup>95</sup> Naudé (2018) *JCP* 414 notes that these rights are those recognised by the UN Guidelines for Consumer Protection. For a detailed discussion of the fundamental rights of consumers see Jacobs et al (2010) *PELJ* 302-406.

<sup>96</sup> Jacobs et al (2010) *PELJ* 302.

<sup>97</sup> Chapter 2, Part A, ss 8-10. The right to equality is related to the right to human dignity as set out in s 1(a) of the Constitution. See Naudé & Eiselen *Commentary* 8-3 – 8-4 for a discussion. This right aims to prevent unfair discrimination.

<sup>98</sup> Chapter 2, Part B, ss 11 and 12.

<sup>99</sup> Chapter 2, Part C, ss 13-21. This right affects s 14 as the consumer has the right to choose with which supplier he wishes to contract. He can, eg, also choose what the duration of the agreement will be up to a maximum of 24 months.

<sup>100</sup> Chapter 2, Part D, ss 22-28. This right affects the consumer in a fixed-term agreement as all relevant information and financial information must be disclosed to him. This right is affected by the plain language requirement in s 22.

<sup>101</sup> Chapter 2, Part E, ss 29-39.

<sup>102</sup> Section 3(1)(d) and Ch 2, Part F, ss 40-47.

<sup>103</sup> Chapter 2, Part G, ss 48-52. See also Naudé (2009) *SALJ* 505-536.

<sup>104</sup> Chapter 2, Part H, s 53-61. For a full discussion of these rights see Jacobs et al (2010) *PELJ* 318-389; Van Eeden & Barnard *Consumer Protection* 381-398; Naudé (2011) *SALJ* 336-351; Tennant *LLD* on good quality and safety, especially 124-158.

<sup>105</sup> Chapter 2, Part I, ss 62-67.

<sup>106</sup> Sharrock *Business Transactions* 587. Also see the UN Consumer Protection Guidelines in Ch 2 para 2.6.



#### 4.2.3.6 Definitions

##### 4.2.3.6.1 Consumer<sup>107</sup>

A consumer is defined in section 1 as a person to whom the supplier markets his or her goods or services in the ordinary course of business; a person who enters into an agreement with the supplier in the ordinary course of business; unless the transaction is exempted in terms of sections 5(2)<sup>108</sup> or 5(3)<sup>109</sup> of the CPA. The ordinary course of business is not defined in the CPA and there are conflicting views on how the term should be interpreted.<sup>110</sup> The definition of consumer further includes a person who uses, receives, or benefits from the particular goods described before, whether he or she was a party to the agreement or not, and a franchisee to the extent applicable in section 5(6)(b)–(e). Such a person, although not directly involved in a consumer transaction, and although the CPA does not expressly define ‘indirect consumer’, is deemed a consumer by implication and will be protected under the CPA.<sup>111</sup> The definition of consumer does not require the person to obtain the goods or services for his or her private or domestic use.<sup>112</sup>

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<sup>107</sup> Section 1 defines consumer as: “‘consumer”, in respect of any particular goods or services, means –

- (a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier’s business;
- (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3);
- (c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and
- (d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e)’.

<sup>108</sup> Section 5(2) provides that: ‘This Act does not apply to any transaction–

- (b) in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister in terms of section 6.’

In terms of s 6(1) the Minister, by notice in the Gazette, determines a monetary threshold applicable to the size of a juristic person for purposes of s 5(2)(b). The threshold has been published in Government Notice 294 in GG 34181 of 1 April 2011, that provides for a threshold of R2 million for juristic persons and for the method of calculation.

<sup>109</sup> Section 5(3) provides that a regulatory authority may apply to the Minister for exemptions on specific grounds.

<sup>110</sup> In this regard see Sharrock (2010) *SA Merc LJ* 301-302; Glover *Kerr’s Sale and Lease* 335-336, Laubscher *LLM* 74-75; Barnard (2019) *THRHR* 164, 167; Stenekamp *LLM* 132. This aspect will be dealt with in more detail in para 4.2.3.8 below, where it is especially relevant for the purpose of lease agreements.

<sup>111</sup> For instance, when a person attending a promotion receives a promotional bottle of wine and suffers from severe food poisoning as a result, he or she will be protected by the provisions of the CPA. See ss 29-39 of the CPA which address such rights. See Tennant *LLD* 99-104; Barnard *LLD* 40, 41, 43. Also see the position in Singapore Ch 5 para 5.3.2.1.1.

<sup>112</sup> See Sharrock (2010) *SA Merc LJ* 300 for a discussion of the definition. This definition differs from the position in the UK, see Ch 6 para 6.3.4.2.1.

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The definition of consumer also covers juristic persons,<sup>113</sup> but excludes juristic persons of which the asset value or annual turnover at the time of the transaction exceeds the threshold value the Minister prescribes from time to time as provided in section 6(1) for the purpose of section 5(2)(b).<sup>114</sup>

The court in *Mati* had to decide the meaning of 'consumer'.<sup>115</sup> It referred to the decision in *Eskom* where 'consumer' was interpreted widely and inclusively.<sup>116</sup> The Supreme Court of Appeal in *Eskom* set two requirements to establish if a third person (not a party to the agreement) is a consumer: first, whether there is a transaction as intended under the CPA, to which a consumer is a party; and second, another (third) party should use the goods after the conclusion of the transaction.<sup>117</sup> The court, therefore, includes a user of goods – the recipient or beneficiary of services or goods – whether that person is an official party to the agreement or not. Even somebody who received and used the goods as a gift is included in the definition.<sup>118</sup> Holderness AJ, therefore, concluded that the third respondent in *Mati* was a consumer for purposes of the CPA, and was entitled to the protective measures in the Act even though he was not officially a party to the lease agreement on which the dispute was based.<sup>119</sup>

Section 14(1) provides that section 14 does not apply to transactions between juristic persons, regardless of annual turnover.<sup>120</sup> Consequently, for purposes of this thesis, I accept that the consumer is a natural person save where specifically otherwise indicated.

#### 4.2.3.6.2 Agreement, consumer agreement, and fixed-term agreement

An 'agreement' is defined in section 1 of the CPA as an arrangement or understanding between or among two or more parties which purports to establish a relationship in law between or among them.

A 'consumer agreement' is defined in section 1 as an agreement between a supplier and a consumer, other than a franchise agreement.

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<sup>113</sup> See discussion in para 4.2.3.6.4 below.

<sup>114</sup> Currently R2 million rand. See Van Eeden & Barnard *Consumer Protection* 42-43.

<sup>115</sup> *Mati* para [48].

<sup>116</sup> *Eskom* para [15].

<sup>117</sup> *Eskom* para [15].

<sup>118</sup> *Eskom* para [15].

<sup>119</sup> *Mati* para [48]. Although he did not sign the agreement as a lessee, his name was mentioned in the list of occupants in the agreement. This aligns with the definition of consumer in subs (c). Also, see s 5(5) which provides that ss 60 and 61 which regulate product liability apply, even though the transaction may be excluded from the provisions of the CPA.

<sup>120</sup> Also see Naudé & Eiselen *Commentary* 14-5.

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There is no definition in the CPA of a fixed-term agreement.<sup>121</sup> The only mention of a fixed-term agreement is found in the CPA Regulations. Regulation 5<sup>122</sup> provides that fixed-term agreements may not exceed 24 months.<sup>123</sup> The reasonable deduction would therefore be that a fixed-term agreement is an agreement that starts on a specific date and ends on a specified or determinable date in the future.<sup>124</sup>

Regulation 5 provides that in exceptional circumstances this 24-month period may be extended – eg, when specifically provided for in a regulation,<sup>125</sup> or where the supplier can show a ‘demonstrable financial benefit to the consumer’.<sup>126</sup> Although the term ‘demonstrable financial benefit’ is also not defined, a supplier could probably prove this requirement if it can show that it gave the consumer a discount on the basis of an extended term for the agreement.<sup>127</sup>

There is no obvious or rational reason why the legislature thought it essential, necessary, or even advisable, to limit the duration of contracts in terms of section 14 of the CPA, as the consumer can cancel the contract in terms of section 14(2)(b)(i)(bb)<sup>128</sup> at any time without explanation. So, section 14(2)(b)(i)(bb) allows the consumer absolute freedom as regards the duration of contracts save for the provision of 20 days’ notice of cancellation. The only party bound by the duration of the agreement is the supplier, and even the supplier could be disadvantaged by the limitation of duration.<sup>129</sup>

#### 4.2.3.6.3 Goods<sup>130</sup>

The definition of goods includes anything marketed for human consumption, tangible objects, including a medium on which anything is written or encoded.

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<sup>121</sup> The *Cambridge English Dictionary* describes the term as ‘lasting for a fixed period of time’. See <https://dictionary.cambridge.org/dictionary/english/fixed-term> (date of use: 7 March 2019); Naudé & Eiselen *Commentary* 14-3. The term ‘agreement’ is defined in s 1 of the CPA as: “‘agreement’ means an arrangement or understanding between or among two or more parties that purports to establish a relationship in law between or among them’. See Sharrock (2010) *SA Merc LJ* 303 for critique of the term agreement.

<sup>122</sup> Regulation 5(1)(a) of The Consumer Protection Act Regulations R293 GN R 293 in GG 34180 of 1 April 2011, (CPA Regulations).

<sup>123</sup> See para 4.2.3.7.9 below for a discussion of s 14(4).

<sup>124</sup> Section 14. Examples of these agreements are, eg, gym membership agreements for a fixed period, lease contracts entered into by consumers, and cell phone contracts. Note that fixed deposits are exempt from the provisions of s 14 of the CPA – see GN 532 in GG 34399 of 27 June 2011.

<sup>125</sup> Regulation 5(1)(b).

<sup>126</sup> Regulation 5(1)(a).

<sup>127</sup> Naudé & Eiselen *Commentary* 14-3.

<sup>128</sup> Section 14(2): ‘If a consumer agreement is for a fixed term – (b) despite any provision of the consumer agreement to the contrary – (i) the consumer may cancel the agreement –(bb) at any other time, by giving the supplier 20 business days’ notice in writing or other recorded manner and form, subject to subsection (3)(a) and (b);’.

<sup>129</sup> See para 4.2.3.7.9 below. This is especially pertinent in lease agreements. See the discussion below in para 4.2.3.8.

<sup>130</sup> Section 1 CPA.

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Literature, music, photographs, motion pictures, games, information, data software, code or other intangible product written or encoded on any medium, or a licence to use such intangible products are also included. A legal interest in land or any other immovable property, other than an interest that falls within the description of a service in section 1, as well as gas, water, and electricity are also included.<sup>131</sup>

For the purpose of this thesis, I use a cell phone as an example of goods.

#### 4.2.3.6.4 *Juristic person*<sup>132</sup>

Juristic person includes close corporations, trusts as defined in the Trust Property Control Act,<sup>133</sup> partnerships, and associations.<sup>134</sup> This is a wide description as the Companies Act 71 of 2008 defines a juristic person as 'includ[ing] a foreign company; and a trust, irrespective of whether or not it was established within or outside the Republic'.<sup>135</sup>

#### 4.2.3.6.5 *Service*<sup>136</sup>

The definition of 'service' is also very wide and covers all forms of service, advice, consultation, banking services, transportation, provision of food and accommodation, access to electronic infrastructure, access to events and facilities, right of occupancy other than rental, and franchise rights.<sup>137</sup> For purposes of this thesis, I use a cell phone service agreement as my example.

#### 4.2.3.6.6 *Supplier*

Any person who markets goods or services is a supplier.<sup>138</sup> A supplier includes both juristic and natural persons.<sup>139</sup>

#### 4.2.3.6.7 *Supply*<sup>140</sup>

Supply is used as a verb in relation to goods, and includes the sale, rental, exchange, and hire of goods in the ordinary course of business<sup>141</sup> for consideration.<sup>142</sup> In relation to services, it means the sale, performance, or causing

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<sup>131</sup> Van Eeden & Barnard *Consumer Protection* 44-45.

<sup>132</sup> Definition as in s 1 of the CPA.

<sup>133</sup> Act 57 of 1988 (Trust Act).

<sup>134</sup> See Van Eeden & Barnard *Consumer Protection* 42-43.

<sup>135</sup> Section 1, Companies Act 71 of 2008.

<sup>136</sup> Services does not include employment, see s 5(2)(e) of the CPA.

<sup>137</sup> Van Eeden & Barnard *Consumer Protection* 45.

<sup>138</sup> Definition in s 1 of the CPA; Van Eeden & Barnard *Consumer Protection* 46.

<sup>139</sup> Naudé & Eiselen *Commentary* 14-5.

<sup>140</sup> Section 1, CPA.

<sup>141</sup> See para 4.2.3.6.1 above.

<sup>142</sup> Section 1 of the CPA: "Consideration" means anything of value given and accepted in exchange for goods or services, including–

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services to be performed or provided, or the granting of access to premises, events, activities or facilities in the ordinary course of business for consideration.<sup>143</sup>

#### 4.2.3.6.8 Transaction<sup>144</sup>

A transaction is when a person acting in the ordinary course of his or her business,<sup>145</sup> contracts with another to supply services or goods for consideration.<sup>146</sup> For example, in the context of this thesis, entering into an agreement for the purchase of a cell phone coupled with a 24-month service agreement.

The definitions relevant to the context of the thesis have now been provided and I turn to a consideration of the essence of the study – section 14 of the CPA.

#### 4.2.3.7 Section 14 of the CPA

##### 4.2.3.7.1 Introduction

Section 14 deals with fixed-term contracts.<sup>147</sup> The need for the section arose, initially and primarily in response to long-term, unreasonable gym contracts.<sup>148</sup> However, in practice its ambit is far wider and includes, for example, cell phone contracts, car lease contracts, and service contracts.<sup>149</sup> Importantly, and in line with section 5(4) of the CPA, all banks registered under the Banks Act, the Mutual Banks Act 124 of 1993, and co-operative banks registered in terms of the Co-operative Banks Act 40

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- (a) money, property, a cheque or other negotiable instrument, a token, a ticket, electronic credit, credit, debit or electronic chip or similar object;
  - (b) labour, barter or other goods or services;
  - (c) loyalty credit or award, coupon or other right to assert a claim; or
  - (d) any other thing, undertaking, promise, agreement or assurance, irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly, or involves only the supplier and consumer or other parties in addition to the supplier and consumer;’.

<sup>143</sup> Definition in s 1 of the CPA; Van Eeden & Barnard *Consumer Protection* 46.

<sup>144</sup> Definition in s 1 – “transaction” means–

- (a) in respect of a person acting in the ordinary course of business–
  - (i) an agreement between or among that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration; or
  - (ii) the supply by that person of any goods to or at the direction of a consumer for consideration; or (iii) the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration; or
- (b) an interaction contemplated in section 5(6), irrespective of whether it falls within paragraph (a);’.

<sup>145</sup> See the discussion in para 4.2.3.6.1.

<sup>146</sup> For purposes of this thesis, this information on the concept ‘transaction’ is adequate. For a discussion of the meaning of transaction see Van Eeden & Barnard *Consumer Protection* 36, 47-48.

<sup>147</sup> Also see the discussion of the term fixed-term agreement in para 4.2.3.7.5 below.

<sup>148</sup> Woker (2010) *Obiter* 217, 224.

<sup>149</sup> Naudé & Eiselen *Commentary* 14-5.

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of 2007, are exempt from the provisions of section 14.<sup>150</sup> Transactions between juristic persons are likewise exempt in terms of section 14(1).<sup>151</sup>

Section 14 forms part of the fundamental right of the consumer to select suppliers, as it resorts under Chapter 2 Part C.<sup>152</sup> The provisions of section 14 aim to:<sup>153</sup>

- limit the duration of fixed-term agreements;<sup>154</sup>
- prohibit the automatic renewal of fixed-term contracts;<sup>155</sup>
- entitle consumers to terminate the agreement on the termination date;<sup>156</sup>
- entitle consumers to terminate the contract on 20 business days' notice at any time during the contract term;<sup>157</sup>
- entitle suppliers to payments in terms of the contract, until date of cancellation, and a reasonable cancellation penalty when consumers give 20 days' notice at any time during the contract term;<sup>158</sup>
- oblige suppliers to give consumers notice of the termination date of the agreement;<sup>159</sup> and
- prohibit the unilateral amendment of the terms and conditions of the agreement.<sup>160</sup>

#### 4.2.3.7.2 *The provision regulating fixed-term contracts, section 14*

To understand the significant impact of the provision on the expiry and renewal of fixed-term contracts I quote section 14 of the CPA at length.

'Section 14. Expiry and renewal of fixed-term agreements –

- (1) This section does not apply to transactions between juristic persons regardless of their annual turnover or asset value.
- (2) If a consumer agreement is for a fixed term –
  - (a) that term must not exceed the maximum period, if any, prescribed in terms of subsection (4) with respect to that category of consumer agreement;
  - (b) despite any provision of the consumer agreement to the contrary –
    - (i) the consumer may cancel the agreement –
      - (aa) upon the expiry of its term, without penalty or charge, but subject to subsection (3) (a); or

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<sup>150</sup> GN 532 in GG 34399 of 27 June 2011.

<sup>151</sup> Note the wide description of juristic person – see para 4.2.3.6.4 above.

<sup>152</sup> Sections 13-21.

<sup>153</sup> See Naudé & Eiselen *Commentary* 14-3–14-4.

<sup>154</sup> Section 14(2)(a).

<sup>155</sup> Section 14(2)(d).

<sup>156</sup> Section 14(2)(b)(i)(aa).

<sup>157</sup> Section 14(2)(b)(i)(bb).

<sup>158</sup> Section 14(3) read with reg 5(2). Initially the cancellation penalty in the Bill was 10%, but this was not taken forward in the Act.

<sup>159</sup> Section 14(2)(c).

<sup>160</sup> Section 14(2)(c).

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- (bb) at any other time, by giving the supplier 20 business days' notice in writing of other recorded manner and form, subject to subsection (3) (a) and (b); or
  - (ii) the supplier may cancel the agreement 20 business days after having given written notice to the consumer of a material failure by the consumer to comply with the agreement, unless the consumer has rectified the failure within that time;
- (c) of not more than 80, not less than 40, business days before the expiry date of the fixed-term consumer agreement, the supplier must notify the consumer in writing or any other recordable form, of the impending expiry date, including a notice of-
  - (i) any material changes that would apply if the agreement is to be renewed or may otherwise continue beyond the expiry date; and
  - (ii) the options available to the consumer in terms of paragraph (d); and
- (d) on the expiry of the fixed-term of the consumer agreement, it will be automatically continued on a month-to month basis, subject to any material changes of which the supplier has given notice, as contemplated in paragraph (c), unless the consumer expressly –
  - (i) directs the supplier to terminate the agreement on the expiry date; or
  - (ii) agrees to a renewal of the agreement for a further fixed-term.
- (3) Upon cancellation of a consumer agreement as contemplated in subsection (1)(b) –
  - (a) the consumer remains liable to the supplier for any amounts owed to the supplier in terms of that agreement up to the date of cancellation; and
  - (b) the supplier –
    - (i) may impose a reasonable cancellation penalty with respect to any goods supplied, services provided, or discounts granted, to the consumer in contemplation of the agreement enduring for its intended fixed term, if any; and
    - (ii) must credit the consumer with any amount that remains the property of the consumer as of the date of cancellation, As prescribed in terms of subsection (4),
- (4) The Minister may, by notice in the Government Gazette, prescribe
  - (a) the maximum duration for fixed-term consumer agreements, generally, or for specified categories of such agreements;
  - (b) the manner and form of providing notices to the consumer in terms of subsection (2) (c);
  - (c) the manner, form and basis for determining the reasonableness of credits and charges contemplated in subsection (3); and
  - (d) other incidental matters as required to provide for the proper administration of this section.'

On first reading one immediately observes that there is an error in subsection 3 as it refers to the cancellation in terms of section 1(b), which should of course read section 2(b). It is necessary first to consider the purpose and interpretation of section 14.

#### *4.2.3.7.3 The purpose of section 14*

Section 14 purports to protect consumers in an unequal bargaining position against exploitation by large corporations who unilaterally draft unreasonable and unfair

‘take-it-or-leave-it’ agreements for an unreasonably long term.<sup>161</sup> Section 14 provides for a maximum duration of these contracts to protect the consumer from being bound to an unreasonably long contract.<sup>162</sup> It also provides the consumer with the right to cancel the agreement at any time during the fixed term without a reason, and, limits the amounts that can be claimed by the supplier as compensation for such early cancellation. Section 14 was intended to serve the purposes of sections 3(1)(c) and 3(1)(d)<sup>163</sup> which aim at promoting fair practices in business, and protecting consumers from improper trade practices and unfair conduct that misleads them.

#### *4.2.3.7.4 Interpretation of section 14*

Section 2(1) provides that the CPA must be interpreted in a way that gives effect to the purposes of the Act set out in section 3.<sup>164</sup> When interpreting the Act, a person, court, Tribunal, or commission may also consider appropriate foreign and international law,<sup>165</sup> and international conventions, declarations and protocol relevant to consumer protection.<sup>166</sup> The decisions of the consumer court, ombuds, and arbitrators should also be considered, insofar as they have not been set aside, overruled or reversed by a High Court, the Supreme Court of Appeal, and the Constitutional Court.<sup>167</sup>

When a document or agreement in terms of section 14 is interpreted, section 4(4) provides that the court or Tribunal should advance the purposes and policies of the CPA and benefit the consumer, specifically when interpreting ambiguities in documents. Also, when interpreting restrictions, limitations, and exclusions in documents, the court or Tribunal should consider the content of the document, its manner and form of presentation, and the circumstances of the transaction or document, and read it so as to benefit the consumer.<sup>168</sup>

#### *4.2.3.7.5 Fixed-term agreements: General*

Section 14 only applies to agreements that are valid for a fixed term, such as a contract for the delivery of a specific service for a period of eighteen months. Section 14(2)(a) provides that the term should not exceed the period prescribed by the Minister of Trade and Industry under subsection 14(4)(a) by notice in the *Gazette*.<sup>169</sup>

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<sup>161</sup> These agreements are standard-form agreements as discussed in para 2.5.

<sup>162</sup> Woker (2010) *Obiter* 224 n 33.

<sup>163</sup> See para 4.2.3.7.8 below.

<sup>164</sup> See para 4.2.3.3 above.

<sup>165</sup> Section 2(2)(a).

<sup>166</sup> Section 2(2)(b), see Ch 2 para 2.6.

<sup>167</sup> Section 2(2)(c).

<sup>168</sup> Regard should be had to the preamble to the CPA. The preamble recognises the need to protect the interests of all consumers, ensure accessible, transparent and efficient redress for vulnerable consumers, give effect to internationally recognised consumer rights, and to promote an economic environment that strengthens consumer rights. Also see para 4.2.3.3 above.

<sup>169</sup> Regulation 5 in GN 293 GG 34180 of 1 April 2011.



Therefore, fixed-terms agreements may not be entered into for a period of more than 24 months. As such, certain types of agreement that do not have a fixed-term could present difficulties, for example, a life-long lease, or even registered long-lease agreements, or time-share agreements for an indefinite period. Although these agreements qualify as fixed-term agreements under the CPA,<sup>170</sup> they should not fall under section 14. Long-term leases are regulated by the Formalities in Respect of Leases of Land Act,<sup>171</sup> and time-share agreements by the Property Time-Sharing Control Act.<sup>172</sup> It could, therefore, be argued that these types of agreement do not fall within the scope of section 14.<sup>173</sup> There are transitional arrangements for pre-existing agreements, but with the CPA having come into operation in 2011, these are no longer relevant.<sup>174</sup>

If the duration of a fixed-term contract exceeds 24 months, the effect of non-adherence to section 14 read with regulation 5(1) that limits the duration of fixed-term contracts, will probably be that the duration of the contract is reduced to 24 months.<sup>175</sup>

Section 14 applies, for example, to gym agreements, cell phone purchase and service agreements, and lease agreements. Lease agreements are discussed separately below.<sup>176</sup> Other affected contracts, for instance time-share agreements, mandates, and sales of immovable property, are also discussed below.

#### 4.2.3.7.6 Section 14(1): Exclusions

Section 14(1) provides that the provisions of the section do not apply to contracts between juristic persons, irrespective of their size.<sup>177</sup> This implies that where a smaller juristic person contracts as a consumer<sup>178</sup> with a supplier who is also a juristic person – the smaller juristic person will not be protected by the provisions of section 14. This is so, even if it is in a lesser bargaining position than the supplier, and even though the smaller juristic person falls within the definition of consumer for the rest of the provisions of the CPA. However, when the same smaller juristic person contracts with an individual who is a supplier, section 14 will protect such

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<sup>170</sup> Naudé & Eiselen *Commentary* 14-4.

<sup>171</sup> 18 of 1969. See para 4.2.3.8 below.

<sup>172</sup> 75 of 1983 (Time-Share Act). See the discussion of time-share agreements in para 4.2.3.9 below.

<sup>173</sup> Naudé & Eiselen *Commentary* 14-4. See the discussion in paras 4.2.3.8 and 4.2.3.9 below.

<sup>174</sup> See Schedule 2 for transitional arrangements, specifically item 3 under this Schedule for more information about the application of the CPA to pre-existing agreements.

<sup>175</sup> Naudé & Eiselen *Commentary* 14-7. Also see ss 51(1)(b)(iii), 51(3), and 52(4). Especially relevant to lease agreements, see para 4.2.3.8 below.

<sup>176</sup> There was initially a difference of opinion if the section applied to lease agreements. See para 4.2.3.8 below; Naudé & Eiselen *Commentary* 14-4.

<sup>177</sup> The CPA applies to small juristic persons, with an annual turn-over or asset value lower than the threshold value set under of s 5(2)(b) of the CPA. See the discussion in para 4.2.3.6.1.

<sup>178</sup> Where the juristic person's asset value or annual turnover is below the threshold value stipulated in terms of s 6, and it is regarded as a consumer in terms of the definition in s 1 of the CPA. See para 4.2.3.6.1.

smaller juristic person. This is regarded as an unintended consequence of section 14(1).<sup>179</sup> It is submitted that the provisions of section 14(1) that exclude smaller juristic persons from the protection of the CPA, do not give effect to the aim and purposes of the CPA as smaller juristic persons could also need the protection provided in section 14, regardless of whether they contract with individuals or juristic persons.<sup>180</sup>

#### 4.2.3.7.7 Section 14(2): Cancellation<sup>181</sup>

Section 14(2)(b)(i)(aa) provides that a consumer may cancel the agreement upon expiry thereof. In terms of section 14(2)(b)(i)(bb) the consumer may cancel the agreement at any other time, by giving the supplier 20 business days' notice.<sup>182</sup> The notice in section 14(2)(b)(i)(bb) must be given in writing, or other 'recorded manner and form'.<sup>183</sup> In such an event, the consumer is liable for the amount owing to date of cancellation, the supplier may impose a reasonable cancellation penalty, and 'must credit the consumer with any amount that remains the property of the

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<sup>179</sup> Naudé & Eiselen *Commentary* 14-4–14-5.

<sup>180</sup> In addition, it could perhaps be argued to be contrary to the provisions of s 8(4) of the Constitution. Section 8(4) of the Constitution provides that, '[a] juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person'. The right in question being equality, as provided in s 9(1) of the Constitution: 'Everyone is equal before the law and has the right to equal protection and benefit of the law'. Also see Ch 5 para 5.4.

<sup>181</sup> Section 14(2) reads: '(2) If a consumer agreement is for a fixed term–

- (a) that term must not exceed the maximum period, if any, prescribed in terms of subsection (4) with respect to that category of consumer agreement;
- (b) despite any provision of the consumer agreement to the contrary–
  - (i) the consumer may cancel that agreement–
    - (aa) upon the expiry of its fixed term, without penalty or charge, but subject to subsection (3)(a); or
    - (bb) at any other time, by giving the supplier 20 business days' notice in writing or other recorded manner and form, subject to subsection (3)(a) and (b); or
  - (ii) the supplier may cancel the agreement 20 business days after giving written notice to the consumer of a material failure by the consumer to comply with the agreement, unless the consumer has rectified the failure within that time;
- (c) of not more than 80, nor less than 40, business days before the expiry date of the fixed term of the consumer agreement, the supplier must notify the consumer in writing or any other recordable form, of the impending expiry date, including a notice of–
  - (i) any material changes that would apply if the agreement is to be renewed or may otherwise continue beyond the expiry date; and
  - (ii) the options available to the consumer in terms of paragraph (d); and
- (d) on the expiry of the fixed term of the consumer agreement, it will be automatically continued on a month-to-month basis, subject to any material changes of which the supplier has given notice, as contemplated in paragraph (c), unless the consumer expressly–
  - directs the supplier to terminate the agreement on the expiry date; or
  - agrees to a renewal of the agreement for a further fixed term.'

<sup>182</sup> See Clark <http://www.polity.org.za/article/fixed-term-contracts-under-the-consumer-protection-act-2011-07-15> (date of use: 23 February 2020) on the impact of this provision on the sanctity of agreements (*pacta servanda sunt*).

<sup>183</sup> Savahl <http://www.polity.org.za/article/fixed-term-agreements-under-the-consumer-protection-act-interesting-implications-for-landlords-2011-03-29> (date of use: 12 May 2020).

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consumer as of the date of cancellation'.<sup>184</sup> Section 14 does not give the supplier a reciprocal right to cancel a fixed-term agreement at any time. A supplier will therefore be bound to the full term of a fixed-term agreement under the CPA and it can be argued that this balances the unequal bargaining positions between the supplier and consumer.

However, under section 14(2)(b)(ii) a supplier may, on material failure of the consumer to perform, cancel the agreement – again with 20 business days' notice.<sup>185</sup> The consumer has no corresponding right to cancel the agreement.<sup>186</sup> If the consumer cancels the agreement under section 14(2)(b)(i)(bb) for whatever reason, the consumer remains liable to the supplier under section 14(3)(a), for any amount up to the date of cancellation. The supplier may also impose a reasonable cancellation penalty for the goods or services supplied or discount granted under a fixed-term agreement under section 14(3)(b). However, if the consumer cancels the agreement in terms of section 14(2)(b)(i)(bb) because of a material failure by the supplier, the consumer will also be liable for any amounts up to cancellation, and, will be liable for the cancellation penalty in section 14(3)(b)(i) even if the supplier did not comply materially. For example, the consumer did not receive the cell phone, or he or she received it, but the service was never activated. It is, therefore, clear that the proverbial sword and shield are provided to the supplier, but the consumer (the primary focus of the legislature) has neither when cancelling because of material or other failure by the supplier.

The consumer who cancels an agreement in the event of a material failure by the supplier will still be liable for any amount due up to the date of cancellation. Section 14(2)(b), therefore, puts a consumer in a weaker position than he or she would have been under the common law. Under the common law the consumer could have based his or her cancellation of the agreement on the repudiation of the agreement, without any payments or penalties.<sup>187</sup> The remedy of repudiation is still available to the consumer in terms of section 2(10), which retains the common law rights.<sup>188</sup> It is therefore unfortunate that section 14(2)(b) effectively offers a supplier better protection than a consumer in the event of material failure; and that a consumer enjoys less protection in the event of material failure by the supplier in terms of the CPA than under the common law.<sup>189</sup> It is submitted that the consumer only has limited cancellation rights or remedies in terms of section 14(2)(b). In fact, this section very obviously disadvantages the consumer and virtually works to the sole advantage of the supplier as the consumer is bound for another 20 business days,

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<sup>184</sup> Section 14(3)(b)(ii).

<sup>185</sup> This provision can cause constant frustration in the case of lease agreements where the supplier will have to give notice every month if and when the consumer does not pay. Naudé & Eiselen *Commentary* 14-8.

<sup>186</sup> Naudé & Eiselen *Commentary* 14-7.

<sup>187</sup> See Ch 3 para 3.3.3.

<sup>188</sup> Section 2(10) will be analysed and discussed in para 4.2.4 below.

<sup>189</sup> See the discussion of repudiation in Ch 3 para 3.3.3.

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and in addition remains liable for payments up to date of cancellation,<sup>190</sup> despite the material non-performance by the supplier. The aim of the *Green Paper*,<sup>191</sup> the preamble to the CPA, and the UN Guidelines for consumer protection,<sup>192</sup> was primarily to protect consumers because of their inferior bargaining position and potential vulnerability. The protection of suppliers was not the intention but section 14(2)(b) has exactly that effect in practice.

In terms of section 14(2)(c) the supplier must give the consumer notice of expiry of the fixed-term agreement, including notice of any material change to the agreement if it is extended beyond 24 months' duration. The notice must include the options available to the consumer in terms of section 14(1)(d)<sup>193</sup> and must be given not less than 40, and not more than 80 business days before the expiry date of the agreement.<sup>194</sup> The notice must inform the consumer that he or she is entitled to cancel the agreement on the expiry date, or is entitled to renew the agreement for a further fixed period if it is not cancelled, or enter into a new agreement for a further fixed-period. Because the CPA is silent on when exactly the consumer must cancel or renew the agreement, he or she may do so until the expiry date.

Section 14(2)(d) of the CPA provides that a fixed-term contract will continue on a month-to-month basis on the expiry of the fixed-term. The aim of this section is to prevent the automatic renewal of the contract for a further fixed term, which could possibly disadvantage the consumer. But, section 14(2)(d) also enables the consumer to extend the agreement if he or she so chooses.<sup>195</sup>

There is no explanation or definition of a 'material change' in section 14(1)(d), and commentators regard this as unfortunate.<sup>196</sup> Any term could potentially be material to the consumer, not necessarily only changes to material terms. However, when a supplier notifies consumers of each and every change, however insignificant, it could lead to an overload of notices, and could cause consumers to not pay

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<sup>190</sup> Section 14(2)(b)(i)(bb) of the CPA.

<sup>191</sup> *Green Paper* Ch 1 para 1.3: '... If these rules are enforced, consumers can be confident that the information provided to them is accurate, that they are given real choices and that the imbalance between individual consumers and businesses, especially larger businesses is addressed ...'.

<sup>192</sup> In the objectives of the UN Guidelines for consumer protection the imbalance in bargaining power of consumers is recognised. See UN Guidelines for Consumer Protection Objectives, 1. See Ch 2 para 2.6.

<sup>193</sup> Section 14(1)(c). The supplier should inform the consumer that the contract will continue on a month-to-month basis upon expiry unless the consumer expressly terminates the agreement. The supplier should further explain that the consumer also has the option of renewing the contract for a further fixed term.

<sup>194</sup> There is a problem with the formulation of this section as it implies that the duration of the agreement must be more than 40 days and less than 80 days – these periods however, most likely refer to the notice period. See Naudé & Eiselen *Commentary* 14-9–14-11 for a discussion of this aspect and for the requirements of the notice itself.

<sup>195</sup> See Hutchison et al *Law of Contract* 381 where they explain that this was common practice before the CPA.

<sup>196</sup> Naudé & Eiselen *Commentary* 14-10.

sufficient attention to notices.<sup>197</sup> Suppliers now have to decide which changes are material in order to notify consumers. Failure to notify consumers in terms of section 14(2)(d) is not dealt with in the CPA, but material changes of which the consumer was not notified may be regarded as inadequate notice to consumers, and the consumer could possibly not be bound by these changes. Failure to adhere to the notice requirements could affect the validity of the fixed-term agreement, but in practice, the agreement will probably continue on a month-to-month basis.<sup>198</sup>

#### 4.2.3.7.8 Section 14(3): Upon cancellation by the consumer<sup>199</sup>

When a consumer cancels an agreement in terms of section 14(2), section 14(3) provides a remedy for the supplier. The supplier cannot only claim amounts owed by the consumer up to date of cancellation, it can also impose a cancellation penalty on the consumer in contemplation of the agreement enduring for its agreed fixed-term, subject to the amounts prescribed in terms of subsection 4.<sup>200</sup>

#### 4.2.3.7.9 Section 14(4): Maximum duration of fixed-term agreements<sup>201</sup>

Section 14(4)(a) provides that the Minister may, by notice in the *Gazette*, prescribe a maximum duration for fixed-term agreements. Regulation 5(1) of the CPA regulations<sup>202</sup> provides that the duration of fixed-term agreements may not exceed 24 months, unless a longer period is expressly agreed upon. The supplier must also show that such longer period holds a clear financial advantage for the consumer.<sup>203</sup> This, of course, is a stringent obligation to put on the supplier as it would require intimate and detailed knowledge of the consumer's financial and other circumstances to prove this successfully. It has been argued that proving upon entering and accepting a contract in excess of 24 months the consumer will receive discounts to which he or she would otherwise not have been entitled, could qualify as a demonstrable financial benefit.<sup>204</sup> The regulation does not state at what stage the supplier must prove the demonstrable benefit: during negotiations; when the contract is concluded; after conclusion; or when a dispute arises. Must the supplier

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<sup>197</sup> Naudé & Eiselen *Commentary* 14-10.

<sup>198</sup> Naudé & Eiselen *Commentary* 14-10.

<sup>199</sup> See also the discussion of s 14(3) in para 4.2.3.7.10.

<sup>200</sup> Savahl <https://www.polity.org.za/article/fixed-term-agreements-under-the-consumer-protection-act-interesting-implications-for-landlords-2011-03-29> (date of use: 12 May 2020). In the Bill there was a prescribed percentage of 10% that was not included in the CPA. See the discussion in para 4.2.3.7.10 below for more detail on how these penalties and fees could be calculated. For a discussion of recommendations and guidelines by an adjudicator see para 4.4.2 below.

<sup>201</sup> Also see para 4.2.3.8 for a discussion of the impact of this limitation on lease agreements.

<sup>202</sup> Regulation 5(1)(a) of the CPA regulations. Aspects of reg 5 directly related to the discussion of s 14(4) appear below. For a discussion of the rest of the provisions of reg 5 see para 4.2.3.7.10 below.

<sup>203</sup> Regulation 5(1)(a) of the CPA Regulations. Delport (2014) *Obiter* 73, 78 and Askew <http://www.polity.org.za/article/a-fixed-understanding-of-section-14-of-the-consumer-protection-act-68-of-2008-2015-03-02> (date of use: 23 February 2020). Also see regs 5(1)(b) and (c) – although neither of these currently applies.

<sup>204</sup> Naudé & Eiselen *Commentary* 14-6.

conclude an additional agreement with the consumer – with the consumer's financial statements attached – to prove this; does he need to make an affidavit, or is a mere written or oral statement to the effect that the contract holds a demonstrable financial advantage for the consumer sufficient? One can hardly imagine that a corporation such as a cell phone service provider would have the time or capacity to meet this burden of proof. The demonstrable financial benefit requirement in regulation 5, read with section 14(4) is therefore vague, highly impractical, if not impossible to adhere to, especially in standard-form contracts that are obviously not individually negotiated.

In addition, for argument's sake if a supplier grants certain discounts to the consumer, and attaches a declaration to this effect to a contract for a term in excess of 24 months, the consumer could still give 20 business days' notice at any time, without providing a valid reason. Granting a discount would then leave the supplier in a position where the contract has been cancelled prematurely, and in addition, he has not been able to obtain the normal remuneration for the contract while it lasted as he provided a discounted rate in the hope of securing a longer-term contract.

Section 14 is silent on the consequences of non-compliance with the 24-month maximum period, although the duration of the contract would probably be reduced to 24 months instead of being declared void.<sup>205</sup>

#### 4.2.3.7.10 Regulation 5

Regulation 5(2) provides guidelines to determine the reasonableness of penalties levied by the supplier in terms of section 14(2)(b)(i)(bb).<sup>206</sup> A discussion of the calculation and determination of the reasonableness or otherwise of the penalty, falls outside the scope of this thesis, and the factors listed in regulation 5(2) will merely be mentioned followed by a general overview. These factors are:

- the amount the consumer owes the supplier up to date of cancellation;
- the value of the transaction until cancellation;
- the value of the goods that the consumer will retain after cancellation;
- the value of goods the consumer will return to the supplier after cancellation;
- the initially agreed duration of the agreement;
- the losses and/or benefits the consumer accrued because of the agreement;
- the nature of the services or goods reserved or booked;<sup>207</sup>
- the period of notice of cancellation given by the consumer;

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<sup>205</sup> See Naudé & Eiselen *Commentary* 7-14.

<sup>206</sup> For a discussion of an ombud decision on the interpretation of reg 5 see para 4.4.2 below.

<sup>207</sup> It is not clear why the words 'reserved or booked' are used – as a fixed-term agreement does not generally involve a reservation or booking, but rather involves a service agreement, goods, or both. For example, the purchase of a cell phone and an agreement to provide voice, data, and sms services to the consumer for a fixed term.

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- the reasonable potential for a diligent service provider<sup>208</sup> to find an alternative consumer between cancellation notice and the time of the canceled reservation; and
- the general practice in the relevant market sector.

In principle, all of these factors could play a role when a fixed-term agreement is cancelled.<sup>209</sup> Notwithstanding these factors, regulation 5(3) provides that the penalty levied must not be an amount that would in effect negate the consumer's right to cancellation. In practice, regulation 5(3) means that the penalty should not equal, or nearly equal, the total payments owed by the consumer for the remainder of the duration of the agreement.<sup>210</sup> Initially the cancellation penalty in the Bill was 10 per cent, but this was not taken forward into the Act.<sup>211</sup> Unfortunately, regulation 5 provides no clear rules or a formula on how the factors in regulation 5(2) must be weighed or calculated.<sup>212</sup> The effect is that considering the individual factors, the amount could possibly negate the consumer's right to cancellation in any event. As at common law,<sup>213</sup> section 2(1) of the Conventional Penalties Act<sup>214</sup> provides that parties can agree in advance on a penalty amount for purposes of section 14(2)(b)(i) when entering into the agreement.<sup>215</sup> However, when a party cancels an agreement lawfully,<sup>216</sup> in other words not based on breach of contract,<sup>217</sup> for instance, when the consumer exercises the right to terminate the agreement on prescribed notice<sup>218</sup> as provided for in section 14(3)(b)(i), the penalty amount will not be subject to the provisions of the Penalties Act as penalties under the Penalties Act require breach of contract.<sup>219</sup> There are differing views on this, as others contend that the penalty amount will be subject to the provisions of the Penalties Act.<sup>220</sup> For the purpose of this thesis, this aspect is not pursued,<sup>221</sup> and, because a cancellation in terms of

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<sup>208</sup> It is submitted that 'service provider' should have been 'supplier' as fixed-term agreements can be entered into in respect of services, goods, or both.

<sup>209</sup> See the discussion in para 4.4.2 below of factors and guidelines the ombud used to establish an amount as penalty in the case of the cancellation of a gym contract. However, a full discussion of these factors falls outside the scope of this thesis.

<sup>210</sup> See para 4.4.2 below.

<sup>211</sup> Naudé & Eiselen *Commentary* 14-13–14-14.

<sup>212</sup> In the Draft Consumer Protection Bill.

<sup>213</sup> See the discussion in Ch 3 para 3.2.11.

<sup>214</sup> Act 15 of 1962 (Penalties Act).

<sup>215</sup> Bearing in mind that when a penalty is provided for, damages cannot be claimed in addition to the penalty amount. See Sharrock *Business Transactions* 769.

<sup>216</sup> Section 1 of the Conventional Penalties Act and Sharrock *Business Transactions* 768-769 are both relevant here. See *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (SCA) (hereafter *Sun Packaging*) para [26] where the court held that 'It affords the appellant the right to terminate', which of course is exactly what is provided in s 14(2)(b)(i) of the CPA.

<sup>217</sup> In other words, not based on breach, but lawfully. See *Da Mata v Otto* NO 1972 (3) SA 858 (A) (hereafter *Da Mata*) 807-871 where the court found that a debtor's liability should derive from a breach of the contract. Also see Sharrock *Business Transactions* 768-769.

<sup>218</sup> See the discussion in Sharrock *Business Transactions* 768-769.

<sup>219</sup> Sharrock *Business Transactions* 768-769; *Sun Packaging* paras [8], [18]-[26].

<sup>220</sup> Naudé & Eiselen *Commentary* 14-17.

<sup>221</sup> This debate falls outside the scope of this thesis.

section 14(2)(b)(i)(bb) is not a breach of contract in that it is expressly authorised by legislation and therefore lawful, I assume for argument's sake that the provisions of the Penalties Act do not apply to the reasonable penalty provided for in section 14,<sup>222</sup> but is governed solely by regulation 5(2). The general rule is that the consumer must prove that the supplier has benefited disproportionately<sup>223</sup> as the penalty clause operates in favour of the supplier.<sup>224</sup> Regulation 5, however, does not expressly provide who bears the onus of proof – yet another shortcoming.<sup>225</sup>

This problem could be resolved by amending the CPA or the Regulations to provide a formula or sliding scale for the calculation of the penalty<sup>226</sup> to which the consumer must agree in writing on conclusion of the agreement. This would ensure that the consumer is fully aware of the extent of his or her liability should he or she elect to cancel the agreement.

#### 4.2.3.7.11 *How the common law is affected by section 14*

The supplier enjoys freedom of contract in the sense that it can draft the section 14 agreement and so protect itself both contractually and through all or some of its common-law rights and remedies. Furthermore, section 51 of the CPA lists a wide range of prohibited transactions and clauses that could disadvantage the consumer.<sup>227</sup> Therefore, the supplier is not entitled to the protection of all the common-law rights or remedies, and its freedom of contract is limited<sup>228</sup> by the CPA's goal of working to the benefit of the consumer.<sup>229</sup> The limitation on the supplier's freedom of contract in section 51 is intended to compensate the consumer for the fact that he or she is in an unequal bargaining position and a take-it-or-leave-it position.<sup>230</sup> Because of the limitation on the freedom of contract of the consumer,

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<sup>222</sup> Sharrock *Business Transactions* 768-769; *Sun Packaging* paras [8], [18]-[26]; *Da Mata* 807-871.

<sup>223</sup> The general rule is that the burden of proof to show that the amount is excessive rests on the party in breach. See Sharrock *Business Transactions* 770.

<sup>224</sup> Van Eeden & Barnard *Consumer Protection* 370; *Steinberg v Lazard* 2006 (5) SA 42 (SCA) paras [10]-[11].

<sup>225</sup> This aspect will not be investigated as it falls outside the scope of this thesis. The only decision on this aspect is an ombud decision, see para 4.4.2 below.

<sup>226</sup> For example, a provision that the penalty will be calculated as follows: 10% of the total amount owed by the consumer for the remainder of the fixed-term period. If a consumer therefore cancels the agreement after two months into a contract for R500 per month for 24 months, the penalty amount will be R1 100. If he or she cancels after 22 months, the penalty will be R100. This calculation would also be fair to the supplier, compensating him or her for losing the protection of the maxim *pacta servanda sunt*, on a sliding scale. It would also be easy for the consumer to calculate so allowing him or her to know exactly what amount will be charged as a penalty.

<sup>227</sup> This aspect is discussed in greater detail in para 4.3.2.3.3 below.

<sup>228</sup> For example, a term that provides that the voetstoets clause applies to the goods sold under the agreement. See para 4.3.2.3.1 below.

<sup>229</sup> See para 4.2.4 below for a discussion of the position of the supplier in respect of his or her common-law rights. See Tennant & Mbele <http://www.saflii.org/za/journals/DEREBUS/2013/17.pdf> (date of use: 29 May 2020) and note that, unlike the common law, the CPA does not give a consumer the right to cancel a contract improperly induced. See Sharrock (2011) *Annual Survey* 538.

<sup>230</sup> See Ch 2 para 2.5 for a discussion of the inferior bargaining position of the consumer.



the maxim *caveat emptor* is of no use to the consumer in these circumstances, especially where standard-form agreements under section 14 of the CPA are concerned.

The 24-month limit on the agreement is a further limitation on the freedom of contract of both the supplier and the consumer.<sup>231</sup> Section 14(4)(c) read with regulation 5(2), prescribes guidelines on the amounts due to the supplier, and the penalty, which is vague as they are of course a further limitation on the supplier's right to freedom of contract as it cannot base its right to recourse purely on the common law.

The principle of *pacta servanda sunt* in effect does not apply to the consumer in section 14 agreements. The consumer can cancel the agreement at any time and without reasons, simply by giving 20 business days' notice.<sup>232</sup> In this light, it is conceivable that the legislature intended the payments under sections 14(3)(a) and (b) as compensation for the supplier for its loss of the common-law right of *pacta servanda sunt*.

Strangely, there is no provision for the consumer to give notice of cancellation without incurring liability for the amounts provided for under section 14(3)(b)(i) read with section 14(4)(c) and regulation 5(2) of the CPA, and the penalty, even if the supplier is in material default. On the one hand, the consumer is left without statutory recourse in the event of a material default by the supplier, which is a serious Achilles heel in the protective armour of the consumer.<sup>233</sup> This deficiency has the effect that the consumer is bound to the agreement in terms of the CPA for an additional 20 business days by *pacta servanda sunt* in these circumstances, and has to pay the penalty or cancellation charges, even when the supplier is in material default.<sup>234</sup>

The supplier, on the other hand, cannot cancel the agreement as and when it wishes and is bound by *pacta servanda sunt* when the consumer is not in default. However, when the consumer is in material default the supplier can cancel the agreement with 20 business days' notice to the consumer. The supplier, therefore, also does not enjoy the protection of *pacta servanda sunt* in these circumstances, as it is not entitled to specific performance, and its right to pecuniary damages is limited by section 14.<sup>235</sup> The supplier does, however, have a statutory right to cancel the agreement if the consumer is in default, even if its rights are limited under the CPA.

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<sup>231</sup> Tennant & Mbele <http://www.saflii.org/za/journals/DEREBUS/2013/17.pdf> (date of use: 29 May 2020).

<sup>232</sup> The consumer has this right in addition to the right to cancel during the cooling-off period.

<sup>233</sup> See para 4.2.3.7.7 above.

<sup>234</sup> Bear in mind that the consumer retains his or her common-law rights under s 2(10) of the CPA. However, he or she may not be aware of these rights, and should be protected by s 14 as the provision is specifically aimed at protecting vulnerable consumers against exploitation.

<sup>235</sup> Of course, limited by the Penalties Act in normal circumstances.

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Although both parties' common-law rights are adversely affected by section 14 of the CPA, especially the right to freedom of contract, section 2(10) of the CPA provides that the consumer retains his or her common-law rights.<sup>236</sup>

#### 4.2.3.7.12 Remedies

The remedies provided in the CPA specifically for section 14 are set out in the section itself.<sup>237</sup> The greatest disadvantage for consumers is that they cannot cancel immediately and without payment and potential penalty when there is material breach by the supplier.

As seen above, the parties retain their common-law rights and remedies, but they must first exhaust the fora in section 69 before they may approach a court. In effect, therefore, section 69<sup>238</sup> excludes the parties from accessing the courts for the application of the common law.<sup>239</sup> The only instance in which a party (consumer or supplier) has direct access to court is where the supplier has allegedly contravened the provisions of sections 40, 41 or 48 of the CPA.<sup>240</sup> However, the powers of courts to establish fairness are limited by the provisions of section 52(1)(b).<sup>241</sup>

#### 4.2.3.7.13 Concluding remarks: Section 14 of the CPA

It is submitted that section 14 of the CPA does not truly empower the consumer. Although the *Green Paper* and the CPA aim to empower and protect the vulnerable consumer,<sup>242</sup> without an effective remedy under section 14 when the supplier is in

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<sup>236</sup> See the discussion in para 4.2.4 below. Note that s 4(4) of the CPA aims to advance the purposes and policies of the Act, and the benefit envisaged in the section could detract from the common-law principle of *contra proferentem* when the wording of the clause in question is vague or unclear. See Sharrock (2011) *Annual Survey* 549-550.

<sup>237</sup> These have been described in paras 4.2.3.7.7 and 4.2.3.7.8 above.

<sup>238</sup> See the discussion of s 69 in para 4.3.7.1 below.

<sup>239</sup> Naudé (2010) *SALJ* 526; Van Heerden & Barnard (2011) *JICLT* 137-138; Mupangavanhu (2012) *PELJ* 330-331.

<sup>240</sup> Section 52(1)(b) and see the discussion of this provision in para 4.3.2.6 below. Mupangavanhu (2012) *PELJ* 338-341.

<sup>241</sup> See the discussion in para 4.3.2.6.

<sup>242</sup> The distinction between consumer protection and consumer rights in the UK is emphasised by Andrews. She contends the main difference lies in the way rights, on the one hand, and protections, on the other, are enforced. A right implies the consumer has full freedom to enforce his or her right or claim where and when he or she chooses, the consumer is not obliged to obtain consent to institute the claim, and the claim is not subject to prior approval. Protection, on the other hand, does not inevitably imply a right, and may, for instance, imply that a regulatory body can, or must take action. Further, the consumer does not necessarily benefit directly, although he or she may, in the longer term, benefit indirectly from action taken by the regulatory body. Therefore, the main difference lies therein that a right effectively empowers a consumer. See <http://competitionpolicy.ac.uk/documents/107435/107584/file50027.pdf> especially 107-108 (date of use: 10 August 2019). Protection normally implies a more passive role for the consumer. For a general discussion see Andrews *Enforcement* 1. Also see para 4.3.5 below on the language used in the CPA.

material breach, this aim cannot be realised because the section in fact impacts unfairly on the consumer.

Having considered the essence of section 14 I move now to a discussion of other 'typical' contracts covered by the section – most notably, lease, time-share, mandate, and sale of immovable property.

#### 4.2.3.8 Lease agreements

##### 4.2.3.8.1 Introduction and application of the CPA to lease agreements

At common law, a lease is a reciprocal agreement in terms of which a lessor agrees to let property to a lessee in return for which the lessee pays rental to the lessor, and enjoys the temporary use and enjoyment of the property.<sup>243</sup> Instead of the CPA defining the term 'lease', the term 'rental' is erroneously defined as a lease agreement. The correct meaning of rental is the amount paid by the lessee to the lessor as consideration for the use and enjoyment of the goods leased – be it a car, a house, or whatever, and the rental forms part of the lease agreement, and although it is one of the essentialia of a lease – it is not a lease agreement as such.<sup>244</sup> This basic and obvious misconception and serious legal mistake confusing the terms 'rental' and 'lease agreement', is worrying as the legislature should define the terms in an Act not only with legal accuracy, but also with clarity to prevent misconceptions and doubt.<sup>245</sup> The term lease will therefore be used when referring to a lease agreement in this thesis.

From the outset there has been debate as to how and to what extent, if at all, lease agreements fall within the ambit of the CPA.<sup>246</sup> To establish whether the CPA applies to leases a few aspects, definitions, and terms of the CPA must be analysed:

- The application of the Act in section 5(1)(a). The CPA applies to every transaction in South Africa, unless exempted in subsections 2, 3, and 4 of section 5.
- 'Agreement' is defined as an arrangement between two or more parties to establish a relationship in law between them.<sup>247</sup>

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<sup>243</sup> See the discussion of the common-law position on leases in Ch 3 para 3.2.16. Glover *Kerr's Sale & Lease* 329; Sharrock *Business Transactions* 315; Van Jaarsveld & Oosthuizen *Handelsreg* 488; De Wet & Van Wyk *Kontraktereg* 355.

<sup>244</sup> Glover *Kerr's Sale & Lease* 536; Van Jaarsveld & Oosthuizen *Handelsreg* 488.

<sup>245</sup> In *Kanhym Bpk v Oudtshoorn Munisipaliteit* 1990 (3) SA 252 (C) 258-259 the court decided that a variation from the normal meaning of a word or term would only be justifiable when the normal meaning of the word would not constitute the correct interpretation of the term in the context of the provision. This would be the case if applied to the term 'rental' in the CPA. Also see Botha *Uitleg* 125.

<sup>246</sup> Glover *Kerr's Sale & Lease* 335-336, 338; Delport (2014) *Obiter* 60, 71-79; Barnard (2019) *THRHR* 164-175; Freebody (2016) *Without Prejudice* 22-23; Laubscher *LLM* 174-176. See also <https://www.property24.com/articles/more-cpa-clarity-for-property-sector/13518> (date of use: 15 April 2019) and Monty (2011) *Without Prejudice* 46.

<sup>247</sup> Section 1 of the CPA. See para 4.2.3.6.2 above.

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- 'Consumer agreement' is defined as an agreement between a consumer and a supplier, other than a franchise agreement.<sup>248</sup>
- The definition of 'transaction' is an agreement between parties for the supply of goods or services.<sup>249</sup>
- The 'supplier' means a person who markets goods or services.<sup>250</sup>
- 'Goods' includes a legal interest, other than a service, in land or any other immovable property.<sup>251</sup>
- When the definition of 'supply' is analysed it provides that supply means the sale, rent, exchange, and hire in the ordinary course of business for consideration.<sup>252</sup>
- 'Service' includes the provision of access to, or use of, any premises or other property in terms of rental.<sup>253</sup>
- The definition of 'rental',<sup>254</sup> is an agreement for consideration in the ordinary course of business, in terms of which temporary possession of any premises or other property is delivered, at the discretion of, or to the consumer, or the right to use any premises or other property is granted, at the direction of, or to the consumer,<sup>255</sup> but does not include a lease within the meaning of the National Credit Act.<sup>256</sup>

When these concepts and the provisions of the CPA are read and interpreted objectively and as a whole, they create the impression that normal lease agreements are covered by the CPA.<sup>257</sup> The only phrase that could possibly raise some doubt is 'in the ordinary course of business' and, of course, the term 'fixed-term agreement' in section 14. Furthermore, section 14(1) of the CPA applies in that lessors can also be juristic persons if they let the property to a consumer as defined

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<sup>248</sup> Section 1 CPA. See para 4.2.3.6.2 above.

<sup>249</sup> 'Transaction means:–

- (a) in respect of a person acting in the ordinary course of business –
  - (i) an agreement between or among that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration; or
  - (ii) the supply by that person of any goods to or at the direction of a consumer for consideration; or
  - (iii) the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration; or
- (b) an interaction contemplated in section 5(6), irrespective of whether it falls within paragraph (a).'

<sup>250</sup> Section 1 and see the discussion in para 4.2.3.6.6 above.

<sup>251</sup> Section 1 and see para 4.2.3.6.3 above.

<sup>252</sup> Section 1 and see para 4.2.3.6.7.

<sup>253</sup> Section 1 and see para 4.2.3.6.5.

<sup>254</sup> Instead of 'lease agreement' as explained.

<sup>255</sup> Which of course should have been 'lease agreement' – and not 'rental', which is the amount paid monthly as remuneration for occupation of the property, as explained.

<sup>256</sup> Section 1 and see para 4.2.3.6.5 above.

<sup>257</sup> Naudé & Eiselen *Commentary Contract 7*; Stenekamp *LLM* 132; Glover *Kerr's Sale & Lease* 335-336; Savahl <http://www.polity.org.za/article/fixed-term-agreements-under-the-consumer-protection-act-interesting-implications-for-landlords-2011-03-29> (date of use: 23 February 2020).

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in section 1 of the CPA.<sup>258</sup> Although immovable property is included in the definition of goods, leases are regarded as a supply of services for purposes of the CPA.<sup>259</sup>

‘In the ordinary course of business’ is not defined in the CPA.<sup>260</sup> Business is defined as ‘the continual marketing of any goods or services’.<sup>261</sup> To fall under the scope of ordinary course of business for a lease agreement, the logical deduction would be that the supplier should be a company or person whose full-time and continuous business is to lease properties, or goods like cars, or accommodation.<sup>262</sup> The private person who lets a second property, or who does not lease properties or goods full-time as his or her main business, should, when interpreting this phrase strictly, not be regarded as a supplier of goods or services for purposes of the CPA.<sup>263</sup> There is, in any event, other legislation which deals specifically with residential leases.<sup>264</sup>

Laubscher supports the view that a transaction where a private owner who rents out his or her property, not as his or her full-time business or occupation, should not fall under section 14 of the CPA.<sup>265</sup> He refers to *AA Mutual Insurance Association Ltd v Biddulph*<sup>266</sup> to support this view.<sup>267</sup> Delpont is critical of the rationale of applying section 14 to leases of immovable property.<sup>268</sup> Barnard, too, questions whether section 14 should apply to residential leases and has misgivings whether section 14 benefits consumers.<sup>269</sup>

However, the approach of the courts, is that section 14 of the CPA covers lease agreements<sup>270</sup> in that its aim is to protect vulnerable consumers. In *Amalgamated Banks of South Africa Bpk v De Goede*,<sup>271</sup> the court held that the phrase ‘in the

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<sup>258</sup> Section 14(1) provides that the section does not apply to transactions where both parties to a fixed-term agreement are juristic persons, irrespective of annual turnover or asset value. Also see Naudé & Eiselen *Commentary* 14-5 where they state that a transaction where the supplier is a natural person will always be covered by s 14. Also see para 4.2.3.7.6 above.

<sup>259</sup> Naudé & Eiselen *Commentary* Contract 7.

<sup>260</sup> See Naudé & Eiselen *Commentary* 5-16–5-18. Note that an ‘intermediary’, as defined in section 1 of the CPA can represent another person in the ordinary course of business and for remuneration with respect to actual or potential supply of any goods or services. This could of course, include the lease of a property. See the discussion of mandate in para 4.2.3.10.

<sup>261</sup> Section 1 CPA.

<sup>262</sup> Stoop (2009) *Annual Survey* 860; Monty (2011) *Without Prejudice* 46; Glover *Kerr’s Sale and Lease* 336.

<sup>263</sup> Glover *Kerr’s Sale & Lease* 336; Barnard 2019 *THRHR* 164, 169.

<sup>264</sup> Sharrock (2010) *SA Merc LJ* 301-302; Glover *Kerr’s Sale & Lease* 335, Laubscher *LLM* 74-75; Barnard (2019) *THRHR* 164, 167. For example, the Rental Housing Act 50 of 1999, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, and the Formalities in Respect of Lease of Land Act 18 of 1969.

<sup>265</sup> Laubscher *LLM* 128.

<sup>266</sup> 1976 (1) SA 725 (A) 739.

<sup>267</sup> Laubscher *LLM* 128.

<sup>268</sup> Delpont (2014) *Obiter* 60, 70-78, contends that this could even prejudice the consumer although he accepts that the current and accepted position is that s 14 covers lease agreements.

<sup>269</sup> Barnard (2019) *THRHR* 164-165, 175.

<sup>270</sup> *Mati*. See Laubscher *LLM* n 717.

<sup>271</sup> 1997 (4) SA 66 (SCA) (hereafter *De Goede*) 75-78.

ordinary course of business' does not imply that the person must conduct the type of business constantly and on a daily basis.<sup>272</sup> The test is whether the transaction was for financial gain and reflected the terms and conditions generally used in that type of transaction. If this interpretation of the phrase is used, a person letting his or her second immovable property would be covered by the CPA. Glover supports this approach.<sup>273</sup> In *Gazit Properties (Pty) Ltd v Botha NO*<sup>274</sup> the court provided guidelines for interpreting 'in the ordinary course of business'. It concluded that it is essential to establish whether the agreement is one normally entered into by solvent business people, with the normal conditions, and under normal circumstances.<sup>275</sup> Section 4(3) provides that if any provision of the CPA read in context, has more than one meaning, the meaning best promoting the spirit and purposes of the CPA benefitting the consumer must be preferred. In other words, the wide interpretation in *De Goede* and *Gazit* benefits the consumer.

Leases of movable property will also resort under section 14 of the CPA. In *Absa Technology Finance Solutions (Pty) Ltd v Michael Bid a House CC and Another*<sup>276</sup> the court ruled that leases of movable property are indeed regulated by the CPA, and referred to section 5 of the CPA.<sup>277</sup>

#### 4.2.3.8.2 The effect of the CPA on lease agreements under section 14

A fixed-term agreement is not defined in the CPA, but the term clearly means that the agreement must be concluded for a specific period.<sup>278</sup> Regulation 5(1) of the CPA sets this period at a maximum of 24 months. Does this mean that in one fell swoop the CPA limits the duration of long-term leases agreed to by the parties and regulated by the law of long leases,<sup>279</sup> and often to the benefit of the consumer?<sup>280</sup> Is this what the legislature intended, and if so, why? Clearly, this could disadvantage the lessee.<sup>281</sup>

Another serious consequence of the application of section 14 to long-term leases is that it allows the consumer to cancel the agreement by notice and without offering a valid reason. For example, the lessor may have spent a considerable amount on preparing the premises for the lessee on the assumption that the lease would be for 24 months or longer. The lessee can now move in, give 20 business days' notice,

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<sup>272</sup> This case dealt with tax law.

<sup>273</sup> Glover *Kerr's Sale & Lease* 337.

<sup>274</sup> 2012 (2) SA 306 (SCA) (hereafter *Gazit*).

<sup>275</sup> *Gazit* para [8].

<sup>276</sup> 2013 (3) SA 426 (SCA) (hereafter *Michael Bid a House*) para [28].

<sup>277</sup> *Michael Bid a House* para [28].

<sup>278</sup> See para 4.2.3.7.5 above.

<sup>279</sup> For instance, long term leases of immovable property registered under notarial lease agreements in the Deeds Registries Office in terms of s 3(1)(p) read with s 77 and s 82 of the Deed Registries Act 37 of 1947.

<sup>280</sup> Provides certainty of accommodation and savings on removal costs as discussed below.

<sup>281</sup> Especially in commercial leases, for example, the high costs of shop fitting and preparation of premises to ensure long-term stability and goodwill.

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and cancel the agreement.<sup>282</sup> There is no logical reason for the legislature to have intended this, nor does it reflect the objects of the *Green Paper* and the CPA. Neither of these documents clearly provides for such an amendment to long-term lease agreements or the law of lease, or that long-term leases involving consumers as lessees are abolished.

There are sound reasons why consumers enter into long-term lease agreements.<sup>283</sup> There is also a reason for the law on long-term leases and for requiring their notarial execution and registration.<sup>284</sup> For instance, the lessor can use the long-term lease as security to borrow money, and the lease agreement is then hypothecated by a mortgage bond,<sup>285</sup> or a notarial bond,<sup>286</sup> which in turn, provides security to the bondholder.<sup>287</sup> The fact that under the CPA consumers can cancel their lease agreements with 20 business days' notice obviously affects the mortgagee's security. The cancellation of these leases also has consequences in that the notarial lease agreement, the title deed of the property, and where applicable the bond documentation, must be submitted to the relevant Deeds Office for cancellations and endorsements to be made and to rectify the official Deeds Registries' data records.<sup>288</sup> The CPA is silent on all these issues which would imply a serious oversight by the legislature, or that section 14 of the CPA was never intended to apply to lease agreements – or at least to long-term lease agreements.<sup>289</sup>

One must, however, bear in mind that the term of a fixed-term lease agreement may be extended if the supplier shows it is to the lessee's advantage.<sup>290</sup> The effect of a few of the disadvantages for lessors and lessees in fixed-term agreements will be illustrated by practical examples, bearing in mind that section 14 does not apply to transactions between juristic persons.<sup>291</sup>

As regards disadvantages to lessors:

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<sup>282</sup> Section 14(2)(b)(i)(bb). See Anon <https://www.property24.com/articles/landlords-ignore-cpa-at-their-peril/13444> (date of use: 23 February 2020); Mhlanga <https://www.property24.com/articles/the-cpa-and-property-lease-agreements/14363> (date of use: 23 February 2020).

<sup>283</sup> See Delport (2014) *Obiter* 74 where he explains there are certain jurisdictions which prescribe minimum periods for commercial leases. An example is New South Wales, which has a five-year minimum period for retail premises as set out in s 21 of the Retail Leases Act 4 of 2003 (Victoria). This thesis does not include a detailed analysis of long-term leases, notarial leases, or the hypothecation of leases, as these aspects fall outside the scope of the thesis. Burchell (2011) *Without Prejudice* 38-39.

<sup>284</sup> Section 77, Deeds Registries Act 47 of 1937 (Deeds Act).

<sup>285</sup> In the case of immovable property, s 81(a) Deeds Act.

<sup>286</sup> In the case of movable property, s 81(b) and 82 Deeds Act.

<sup>287</sup> Jones *Conveyancing* 409. (I refer to the 3ed of Jones's work as it is widely accepted in conveyancing practice to be a better edition, and better authority on conveyancing and the provisions of the Deeds Registries Act than the later edition/s.)

<sup>288</sup> Section 78, Deeds Act.

<sup>289</sup> However, take note that s 2(9) of the CPA could apply by implication.

<sup>290</sup> See the uncertainties and practical problems regarding this aspect discussed in para 4.2.3.7.9.

<sup>291</sup> Section 14(1) CPA, see the discussion in para 4.2.3.7.6 above.

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- The lessor will not have a guaranteed return on his or her investment, and will also not have legal and financial certainty that the premises will be occupied for a longer term, at the most 24 months. In addition, the lessee can give 20 business days' notice of vacation of the premises at any stage during the initial 24 months.
- The lessor will not have the certainty that he can spend time and money marketing and preparing the premises for a potential lessee.
- The penalty provided for in section 14(3)(b)(i) cannot possibly compensate the lessor for shortening the duration of the lease from, for example, fifteen years to 24 months, or even less, where the consumer (lessee) gives notice in terms of section 14(2)(b)(i)(bb). This is especially true where there have been high preparation and marketing costs involved in advertising the lessee's presence in certain business premises.
- When section 14 applies, the lessor will not be in a position to cancel the agreement during the initial 24-month period unless, of course, the lessee is in material breach. In that event, the lessor would have to give 20 business days' notice every month that the lessee is in arrears, and were the lessee to pay just before the expiry of the cancellation period, the result could be the negation of a monthly advance payment in the agreement<sup>292</sup> – a form of consequence-free serial breach of contract surely not intended by the legislature!
- The lessor<sup>293</sup> could be reluctant to contract with an individual because of section 14 of the CPA<sup>294</sup> which minimises the pool of suitable lessees from which the lessor can choose.<sup>295</sup>

The potential negative effect of section 14 of the CPA on the consumer as a lessee are:

- The lessee would lose the legal and financial certainty of remaining in occupation of the premises for a fixed longer period at a specified rental subject to specified increases. There are obvious advantages for the lessee in this, such as saving on removal costs, avoiding children's schooling disruptions, etcetera.<sup>296</sup>

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<sup>292</sup> Steyn (2014) *De Rebus* 25-26.

<sup>293</sup> Where the lessor is a juristic person.

<sup>294</sup> Harris <http://www.polity.org.za/article/cpa-could-make-property-harder-to-rent-for-tenants-2011-10-11> (date of use: 22 February 2020) and Hastie <http://www.polity.org.za/article/the-consumer-protection-act-and-lease-agreements-2011-11-30> (date of use: 22 February 2020).

<sup>295</sup> For example savings on accountants' fees.

<sup>296</sup> See, eg. the amendments to the Regulations Relating to the Admission of Learners to Public Schools, 2001 (GenN 4138 in PG 129 of 13 July 2001) by the Amendments to Regulations Relating to the Admission of Learners to Public Schools, 2019 (PN 268 in PG 85 of 18 March 2019) under the Gauteng Schools Education Act 6 of 1995. In terms of these regulations a learner is allowed access to a school, among others, if his or her residence falls within a school's feeder zone.



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- Section 14 could prevent individuals from entering into lease agreements with juristic persons especially in respect of commercial property, as lessors do not want to be hampered by the provisions of section 14 of the CPA and could insist or prefer leasing to a juristic person. At the same time it discourages individuals from taking part in the economy and prevents the potential growth and establishment of small businesses, starting off as individually-owned businesses, and growing, becoming more successful and eventually being converted into companies. This has financial implications, as it is expensive to incorporate and operate a company, for instance appointing and remunerating auditors, and paying annual CIPC fees.
- When the lessee is a natural person in business, the shorter lease term could force him to move to another location and cause disruptions to his business, as well as additional costs related to for instance removal costs, and new marketing material to advertise his new address.
- A lessor could be willing to extend certain discounted rates for longer-term leases, and the lessee could save money that way.<sup>297</sup> Due to the section 14 of the CPA limitations the lessor is not guaranteed a lease period of say, five years, or even two years, and this will result in the lessee losing the potential advantage of being given a discounted rate.
- A longer-term lease could enable lessees sufficient time to recover their initial costs, especially for new businesses.
- The limitation on the duration of lease agreements could also affect consumers' ability to obtain credit from banks to start their businesses, as banks would argue that no business can start up and recover costs in so short period.<sup>298</sup> Not obtaining a loan because of section 14 limitations would mean excluding the consumer from an economic opportunity.
- With longer-term leases registered in the Deeds Office the lessee's personal rights become real rights and can be mortgaged, thereby offering him improved legal protection, and in addition, the registration in the Deeds Office acts as security for loans on leases for immovable and or movable goods. Section 14 excludes this possibility.
- The lessee can have certainty about long-term costs,<sup>299</sup> and a guaranteed presence in a specific shopping complex for example, and that could be to his advantage in competing more effectively with competitors in the area. Section 14, through its limitations will render this advantage impossible.

I have now analysed the position under section 14 of the CPA regarding lease agreements, and will conclude this topic.

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<sup>297</sup> Delport (2014) *Obiter* 73-74.

<sup>298</sup> Delport (2014) *Obiter* 74.

<sup>299</sup> Steyn (2014) *De Rebus* 25-26.

#### 4.2.3.8.3 Concluding remarks: The CPA and lease agreements

Glover concludes that the law of lease is not affected by the CPA to the same extent as, for example, the law of sale.<sup>300</sup> However, there are many instances where both suppliers and consumers can be detrimentally affected, and this should not be ignored.

The legislature's intention that section 14 should apply to lease agreements appears to have been misguided and based on incorrect legal terminology and insufficient legal understanding – eg, the use of the term 'rental' instead of 'lease agreement'. The provisions in section 14 that affect leases are short-sighted and not integrated with other relevant legislation. These aspects need serious attention to correct duplication and contradictions. The application of section 14 of the CPA should be directed at contracts where there is an unequal bargaining position,<sup>301</sup> to protect vulnerable consumers, and work to their advantage, not to disadvantage them. Where lease agreements are alleged to be unreasonable, unfair, or unconscionable the consumer will in any event be protected by the provisions of the CPA.<sup>302</sup>

#### 4.2.3.9 The CPA and time-share agreements<sup>303</sup>

A time-share agreement is an agreement in terms of which the seller, generally a property developer, sells a specific week or weekend in a certain property to the purchaser. This enables a developer who sells weekly units, for instance, to sell the property to 52 different purchasers rather than the entire property to a single purchaser, which obviously improves his or her profit margin. This also enables purchasers, who would normally not be able to afford purchasing a holiday home or flat, to purchase a specific time-slot in which to use the property.<sup>304</sup> There are many ways to sell time-share, including the points-based systems, normal time-share, share-block schemes, and a club system.<sup>305</sup> Time-share contributes greatly to South Africa's gross domestic product (GDP),<sup>306</sup> so it is important to regulate the industry effectively, not only from a consumer protection point of view, but also as a matter of economics.

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<sup>300</sup> Glover *Kerr's Sale & Lease* 340.

<sup>301</sup> Delport (2014) *Obiter* 78.

<sup>302</sup> For instance Parts F, G and H of Ch 2 of the CPA.

<sup>303</sup> Regulated also by the Property Time-Sharing Control Act 75 of 1983. (Time-Sharing Act). The concept of time-share is defined in the Time-Sharing Act as 'time-sharing interest', but will be referred to in this thesis as time-share.

<sup>304</sup> Mupangavanhu & Van Huyssteen (2017) *Stell LR* 657-658.

<sup>305</sup> For a discussion see Mupangavanhu & Van Huyssteen (2017) *Stell LR* 658-661.

<sup>306</sup> <http://www.thencc.gov.za/sites/default/files/news/NCC%20REPORT%20ON%20INQUIRY.pdf> (date of use: 13 May 2020) and see the statement by Commissioner Mohamed at the release of the aforementioned report <http://www.thencc.gov.za/sites/default/files/news/Statement%20by%20Commissioner.pdf> (date of use: 13 May 2020); <https://www.vfplus.org.za/media-releases/investigation-into-irregularities-in-holiday-club-industry-finalised-report-to-be-made-available-soon> (date of use: 7 December 2018); <https://maroelamedia.co.za/nuus/sa-nuus/verslag-oor-vakansieklubs-bekend/> (date of use: 7 December 2018).

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The most important question one can raise is whether the CPA – and section 14 in particular – applies to time-share?<sup>307</sup> When the definitions of goods and services are analysed, time-share should be covered by the CPA, probably falling under the definition of services.<sup>308</sup> If the contract is for a specific duration, like some of the holiday points-based systems, section 14 will be applicable and the consumer should be entitled to cancel the contract with 20 business days' notice.<sup>309</sup> In the report by the Commission,<sup>310</sup> it recommended that all time-share contracts be regarded as fixed-term contracts.<sup>311</sup>

There has been a paucity of litigation in this respect, and until there is a judgment on these or similar facts, or until legislation regarding time-share is amended, the position remains uncertain.<sup>312</sup>

Because of numerous consumer complaints regarding time-share agreements,<sup>313</sup> the Commission conducted a study which revealed that most problems arose under the points-based systems. The most common complaints were that:<sup>314</sup>

- points-based agreements could not be cancelled and extended in perpetuity, consumers consequently had to waive points,
- the accommodation was not readily available,<sup>315</sup>
- alternative accommodation offered was not acceptable,
- there were misrepresentations during sales and negotiations,
- the value of points sold to consumers was insufficient,
- the membership fees and annual increases in fees were unpredictable,
- points clubs' annual meetings were inaccessible, and

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<sup>307</sup> Naudé & Eiselen *Commentary* 14-4 regard time-share contracts as problematic, as they are generally not subject to a specific term. See also Naudé & De Stadler (2019) *PELJ* 16-17.

<sup>308</sup> Time-share is covered by subs (f) under the definition of 'service' in s 1 of the CPA. Subsection (f) reads: 'a right of occupancy of, or power or privilege over or in connection with, any land or other immovable property, other than in terms of rental.' Mupangavanhu & Van Huyssteen (2017) *Stell LR* 666.

<sup>309</sup> Some time-share point agreements are for a specific period, eg, 15 years.

<sup>310</sup> <http://www.thencc.gov.za/sites/default/files/news/NCC%20REPORT%20ON%20INQUIRY.pdf> (date of use: 13 May 2020).

<sup>311</sup> <http://www.thencc.gov.za/sites/default/files/news/NCC%20REPORT%20ON%20INQUIRY.pdf> (date of use: 13 May 2020) 14. A further recommendation was that the Minister should promulgate Regulations in terms of section 14(4) of the CPA to regulate the purchase of points and membership application agreements, entered into between consumers and clubs, as fixed-term agreements, see page 125.

<sup>312</sup> However, see a dispute adjudicated by the Consumer Goods and Services Ombud (CGSO): Dispute Complaint No 201602-0006059 heard by Melville on 22 March 2016.

<sup>313</sup> De Stadler (2013) *Consumer Law Review* 3 points out that during 2013 the NCC asked the time-share industry to provide clarity on its business model.

<sup>314</sup> See <https://maroelamedia.co.za/nuus/sa-nuus/verslag-oor-vakansieklubs-bekend/> (date of use: 7 December 2018) and Report National Consumer Commissioner, <http://www.thencc.gov.za/news-0?qt-news=0> (date of use: 7 December 2018); <http://www.thencc.gov.za/sites/default/files/news/NCC%20REPORT%20ON%20INQUIRY.pdf> (date of use: 13 May 2020).

<sup>315</sup> Monty (2014) *Without Prejudice* 36.

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- consumers were dissatisfied by the way their complaints were handled.

The Commission's<sup>316</sup> proposals impacting directly on this thesis include:<sup>317</sup>

- that sellers of time-share should make certain information available to consumers before conclusion of the contract,<sup>318</sup>
- that all time-share agreements be defined and classified as fixed-term agreements, and
- that the rights of consumers in terms of section 14 of the CPA automatically apply when consumers cancel these agreements.<sup>319</sup>

Therefore, agreements for a fixed-period should already be covered under section 14 of the CPA, and, once the proposals of the Commission have been accepted and enacted, section 14 cancellation provisions should apply to all types of time-share agreements.<sup>320</sup> It would definitely be to the advantage of the time-share industry and consumers to be regulated by section 14 of the CPA to prevent abuses and to protect consumers.<sup>321</sup>

I now briefly mention a few other contracts that could be affected by section 14 of the CPA.

#### 4.2.3.10 *Mandate*

A mandate agreement is an agreement where the seller/lessor of property authorises another person to sell or lease his or her property. The mandate agreement should contain a calendar date to state when the mandate will expire.<sup>322</sup> One of the parties must of course be an individual if section 14 of the CPA is to apply.<sup>323</sup> In addition and by implication, in practice the duration of the mandate should be longer than 40 business days, as the supplier has to notify the consumer

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<sup>316</sup> Hereafter the Commission.

<sup>317</sup> Report National Consumer Commissioner <http://www.thencc.gov.za/news-0?qt-news=0> (date of use: 7 December 2018) 7; <https://www.vfplus.org.za/media-releases/investigation-into-irregularities-in-holiday-club-industry-finalised-report-to-be-made-available-soon> (date of use: 7 December 2018); <https://maroelamedia.co.za/nuus/sa-nuus/verslag-oor-vakansieklubs-bekend/> (date of use: 7 December 2018).

<sup>318</sup> See the discussion of this aspect in Ch 5 para 5.3.2.5 and Ch 6 para 6.4.

<sup>319</sup> Other proposals were also made, eg, the amendment of the Time-Share Act, industry specific legislation, and a new regulator for time-share.

<sup>320</sup> Except those for cash consideration.

<sup>321</sup> See Naudé & De Stadler (2019) *PELJ* 16-17. Also see the discussion of time-share in Singapore, Ch 5 para 5.3.2.5 and the UK Ch 6 para 6.4.

<sup>322</sup> Clause 3.3.2 of the estate agents code of conduct, which is not law and not enforceable in court. However, a transgression of this code could lead to disciplinary action in terms of the Estate Agency Affairs Act 112 of 1976.

<sup>323</sup> Section 14(1) of the CPA.

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of the expiry date of the agreement 40 business days before expiry of the agreement in terms of section 14(2)(c) of the CPA.<sup>324</sup>

The application of section 14 of the CPA to mandate agreements<sup>325</sup> appears to be unintended according to Delport.<sup>326</sup> However, one can also view this as an added protection for consumers as they will be protected by the rest of the provisions of the CPA, for instance, the provisions of section 54, section 61, and the fairness measures.<sup>327</sup>

#### 4.2.3.11 *Sales of immovable property*<sup>328</sup>

The provisions of the CPA apply to sales of immovable property if the supplier sells properties in the ordinary course of his or her business.<sup>329</sup> When the sale is an instalment sale, it will qualify as a credit agreement under the NCA.<sup>330</sup> When a sale of immovable property is for a fixed-term, section 14 will apply – eg, when a supplier sells a house to a consumer and the consumer has to pay the purchase price in six payments, six weeks apart, and is then entitled to registration of the property against payment of the sixth and final payment.<sup>331</sup>

#### 4.2.3.12 *Concluding remarks: The effect of section 14 of the CPA*

Although section 14 of the CPA is well-intentioned, one can conclude that many of the consequences of the section were not anticipated by the legislature, and clearly disadvantages the consumer.<sup>332</sup> Some subsections, for instance section 14(2)(b)(i)(bb), clearly benefit the consumer when the consumer cancels on his own accord, and not based on material failure to perform by the supplier.

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<sup>324</sup> Delport (2014) *Obiter* 72-73.

<sup>325</sup> For the effect of the CPA on mandates see Naudé & Eiselen *Commentary* Contract 8.

<sup>326</sup> Delport (2014) *Obiter* 75-76.

<sup>327</sup> Section 54 deals with the consumer's right to goods that are safe and of good quality. Section 61 deals with liability for damage caused by goods, and strict liability applies regardless. See Naudé & Eiselen *Commentary* Contract 8 for a discussion. Note that a new Act will regulate property practitioners, namely, the Property Practitioners Act 22 of 2019, which was signed in September 2019.

<sup>328</sup> Consumers (purchasers) are protected in sales agreements for immovable property by the Alienation of Land Act 68 of 1981. In addition, the NCA covers credit agreements involving immovable property.

<sup>329</sup> There are exclusions: when the purchaser or lessee is the state, and when the purchaser or lessee is a juristic person above the threshold, and when the sale falls within the ambit of the NCA. See Delport (2014) *Obiter* 63-64.

<sup>330</sup> Section 5(2) of NCA.

<sup>331</sup> Bear in mind that Ch I of ALA applies to all alienations of immovable property and, depending on the duration of the agreement, Ch II of ALA could also apply to the contract. Also, bear in mind that, depending on the exact wording of the agreement and the conditions regarding payment of the purchase price, such an agreement could also qualify as a credit agreement under s 8 of the NCA.

<sup>332</sup> For instance, paras 4.2.3.8 and 4.2.3.9 above.

However, as established at the outset, section 2(10) of the CPA expressly retains the consumer's common-law rights. How this affects the rights of both supplier and consumer in fixed-terms contracts is now considered.

#### 4.2.4 Retention of common-law rights: Section 2(10)

Section 2(10) of the CPA provides that '[n]o provision of this Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law'.

First, it is important to establish what the purpose of this provision is. When read in the context of the Constitution, the preamble to the CPA, and the purpose of the CPA as set out in section 3, it is clear the CPA aims to protect and empower the consumer who is in an unequal bargaining position and cannot insist on or negotiate the inclusion of all his or her common-law rights and remedies in the agreement, even when he or she is aware of those rights. The supplier, on the other hand, is generally financially strong, better informed, literate, financially literate, and has access to legal counsel to draft the section 14 agreement and protect him or her.<sup>333</sup> The legislation seeks to place the consumer in an equal bargaining position with the supplier and so section 2(10) is there to ensure he or she is treated fairly and has these common-law rights, even if not expressly included in the agreement. He or she will also enjoy his or her common-law rights even where they have been expressly renounced in the agreement.<sup>334</sup> In principle, this intention is admirable.

In interpreting section 2(10) Sharrock points out that the section also implies the consumer not only obtains and exercises common-law rights, but also has the associated common-law duties and obligations towards suppliers.<sup>335</sup> The consumer can, therefore, not simply avoid his or her obligations to the supplier on the basis of the benefits, purposes, and aims of the CPA, but must also meet his or her common-law duties and obligations under section 2(10).

A further question is therefore whether section 2(10) implies that the supplier loses all its common-law rights and remedies?<sup>336</sup> To answer this question it is first necessary to analyse the rules of legislative interpretation to establish if this could be the case. Of course, section 3 of the CPA that deals specifically with the interpretation of the CPA will also be considered.

The general rules for the interpretation of legislation provide:

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<sup>333</sup> The consumer might not be aware of these rights.

<sup>334</sup> See s 51 of the CPA which prohibits certain transactions, clauses, and terms and conditions.

<sup>335</sup> Sharrock *Business Transactions* 588.

<sup>336</sup> Tennant argues that he does, see Tennant *LLD* 187. Van Heerden & Barnard (2019) *THRHR* 462 also opine that only the consumer retains his or her common-law rights. See also Naudé & Eiselen *Commentary* 2-10-2-12, 56-4-56-7. Bearing in mind ss 2 and 3 of the CPA on the interpretation and purpose of the Act.

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- a presumption against the deprivation of existing rights;<sup>337</sup> and
- a presumption that legislation respects the common law,<sup>338</sup> and does not amend it unless this appears clearly and unequivocally from the legislation<sup>339</sup> – this is not clearly provided in section 2(10).

The provision does not expressly provide that suppliers lose all their common-law rights and can therefore be deprived of these rights and remedies merely by mere implication. Of course, the fact that they too are required to fulfil their common-law obligations and duties, also benefits the consumer.<sup>340</sup>

Even if it is contended that there is merit in arguing that the supplier loses these rights by implication, this could be countered by resort to section 9 of the Constitution. The reason for this being that one of his basic human rights is affected,<sup>341</sup> and, there is a presumption that legislation respects the Bill of Rights, and that the rights extended therein have to be protected, promoted and fulfilled when legislation is interpreted.<sup>342</sup> In addition, the CPA contains a provision to ensure justice and fair treatment,<sup>343</sup> a benefit of doubt in favour of consumers,<sup>344</sup> and special protection for those consumers mentioned in its section 3(1)(b).<sup>345</sup> It follows that when suppliers have duties, they invariably also have rights.

A further possible argument against the supplier losing its common-law rights by implication lies in the wording of section 2(10) itself which provides: 'No provision of this Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law.' In the case of a dispute falling under section 14, it would, in general, be a clause in the agreement or the agreement itself in dispute and requiring interpretation – not a provision of the CPA.<sup>346</sup> Such agreement or its provisions is not prescribed in the Act, the regulations, or in a schedule to the

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<sup>337</sup> Botha *Wetsuitleg* 173. However, remember that legal interpretation and the presumptions used in legal interpretation are tempered by the Constitution, see Laubscher *LLM* 56.

<sup>338</sup> For guidance on the factors a court should take into account when developing the common law see *Mighty Solutions* para [39]; Naudé & Eiselen *Commentary* 2-11; and see the discussion of *Mighty Solutions* in Ch 3 para 3.1.1.

<sup>339</sup> Botha *Wetsuitleg* 172; *Mighty Solutions* para [39].

<sup>340</sup> *Gordon v Standard Merchant Bank* 1983 (3) SA 68 (A) 87-88. Bear in mind the provisions of s 4(3) of the CPA.

<sup>341</sup> Sections 9(1) and 9(2) and 36 of the Constitution.

<sup>342</sup> *Phumelela Gaming and Leisure Limited v Gründlingh and Others* 2006 (8) BCLA 883 (CC) paras [26]–[27] (hereafter *Phumelela*); Botha *Wetsuitleg* 173.

<sup>343</sup> Section 3(1)(a) and (b) of the CPA.

<sup>344</sup> Section 4(3) of the CPA.

<sup>345</sup> See Barnard & Botha (2018) *SA Merc LJ* 231-235, in this article the authors opine that trade unions are included in the definition in s 3(1)(b).

<sup>346</sup> In other words it would be a contractual dispute – not one based on the interpretation or wording of the statute itself.

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Act, and therefore this section should not apply to disputes based on the agreement, as the common-law still regulates agreements.<sup>347</sup>

The other side of the coin is that a statutory body or court must bear the aims and purposes of the Act in mind, constitutional principles,<sup>348</sup> and specifically section 4(3) which deals with provisions that can be construed to have more than one meaning. In these circumstances, the protection of the consumer will have priority. However, even the consumer's priority, or the fact that the CPA must be interpreted to benefit the consumer and not the supplier, cannot in my view, imply that the supplier loses all his or her common-law rights.<sup>349</sup> It will be interesting to see what a court would decide in a case based on these facts.

A factor not addressed by section 2(10) is whether only a court can adjudicate the dispute when deciding a case based on the common-law rights of parties, or if the bodies mentioned in section 69 also have jurisdiction?<sup>350</sup> On the one hand, if only a court has jurisdiction, the consumer could be disadvantaged as he or she will lose the theoretical time and cost advantages the section 69 bodies hold.<sup>351</sup> Court procedures are time consuming and costly. On the other hand, the mere fact that the section expressly states the consumer retains all his common-law rights can be seen to imply that he or she may in any event approach the court directly – notwithstanding the court in *Joroy 4440 CC v Potgieter and Another NNO*<sup>352</sup> deciding the converse.<sup>353</sup> However, one school of thought proposes that section 69 should be interpreted to mean that only disputes based on the CPA, and not other causes of action, like the common law, should be subject to the provisions of section 69.<sup>354</sup>

Section 2(10) presents further potential problems in practice. How will a court decide which common-law rights to implement? Section 2(10) is widely phrased and how a statutory body – if statutory bodies indeed have jurisdiction to decide common-law disputes and issues – or a court will decide which common-law right or remedy

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<sup>347</sup> Some sections relate to, eg, the maximum duration, but the agreement and its specific provisions are not part of the CPA and are regulated by the common law. See Van Eeden & Barnard *Consumer Protection* 59-61.

<sup>348</sup> For example, the right to freedom of trade, occupation, and profession; property rights; and the principle of legality. See *Mighty Solutions* for a discussion of this aspect.

<sup>349</sup> If these arguments are not correct, the warning by Du Preez could become a reality, it could not be worthwhile for suppliers to enter into agreements with consumers in terms of the CPA as there would be no advantage for them. Du Preez (2009) *TSAR* 63, 66.

<sup>350</sup> Both these points of view are valid, and the section is not clear. Naudé & Eiselen *Commentary* 2-11.

<sup>351</sup> In addition, these bodies are not always effective. Naudé & Barnard *Enforcement* 570; Koekemoer (2017) *JCP* 423-443. Also, see a similar study by Koekemoer (2014) *JABR* 659-669 on a similar study in the Motor Vehicle Service Industry; Scott *LLD* 51; Woker (2019) *Stell LR* 104-107; Du Plessis (2018) *SA Merc LJ* 340-346; Naudé (2010) *SALJ* 525-528. Also, see the discussion in para 4.3.7 below.

<sup>352</sup> 2016 (3) SA 465 (FB) (hereafter *Joroy*).

<sup>353</sup> *Joroy* paras [8]–[10].

<sup>354</sup> Although the wording of s 69 is wide enough to cover both instances. See Naudé & Eiselen *Commentary* 2-11–2-12.



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to implement, and how wide the body or the court's discretion will be, remains to be seen. Does the statutory body or court merely read a provision into the agreement that would most benefit the consumer,<sup>355</sup> and where there are two or more benefits available how will the body or court choose one? The body or court will probably be guided by the provision in the CPA which provides that the consumer should benefit, and select what is most beneficial for the consumer.<sup>356</sup>

A few interesting practical implications in this scenario come to mind:

- Can the court insert conditional clauses retrospectively into the agreement to protect the consumer?
- Can the court insert suppositions into the agreement?
- Can the court insert waivers of suppliers' rights into the agreement?
- Can the court insert penalty clauses that would benefit the consumer?
- Can the court read a clause into the agreement granting the consumer the reciprocal right the supplier has under section 14(2)(b)(ii)?
- Will a court decide that it cannot interfere and contract retroactively on behalf of a party?<sup>357</sup>
- Will the court decide that this subsection is so wide and vague that it cannot be interpreted by courts with any measure of certainty and therefore is void or unenforceable?

As none of these issues has served before the courts, no hard-and-fast answers are possible. No two judges, courts, presiding officers, or adjudicators will interpret and apply the common-law rights in this provision in the same way. Again, the inclusion of section 2(10) was clearly well intentioned, but it poses more questions than answers, is potentially problematic, its outcome is unpredictable, and it needs further clarification to establish legal certainty and be truly useful in practice.

In addition, it will be difficult for a consumer to identify his or her common-law rights in practice and he or she may only access the courts to enforce these rights once all the other steps in terms of section 69(d) have been exhausted<sup>358</sup> – unless he or she bases the claim on unfairness, in which case the courts may be approached directly.<sup>359</sup> The applicable common-law rights and remedies should be clarified in the relevant section of the CPA, in addition to the rights and remedies available to

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<sup>355</sup> Section 4(3) CPA.

<sup>356</sup> Section 4(3) CPA.

<sup>357</sup> Sharrock *Business Transactions* 192, contends that courts have the power to insert new clauses into an agreement when necessary. See too, *Murray v Minister of Defence* 2009 (3) SA 130 (SCA) paras [63]–[68].

<sup>358</sup> See Van Heerden & Barnard (2011) *JICLT* 131-136 discussing redress for consumers in terms of the CPA.

<sup>359</sup> Section 52 allows a complainant direct access to court by implication, but bear the limitations in s 52(1)(b) in mind. See the discussion in para 4.3.2.6.

the consumer under the CPA which place him or her in a better position than before the CPA was adopted.<sup>360</sup>

Section 2(10) undoubtedly benefits the consumer who wishes summarily to cancel his or her section 14 fixed-term agreement on the basis of the supplier's repudiation of the contract in that he or she may do so immediately.<sup>361</sup> It still allows the consumer the option to enforce his or her common-law rights against a supplier in default, while section 14(2)(b)(i) of the CPA disadvantages, and even penalises, a consumer who seeks to cancel a fixed-term agreement as a result of the supplier's material default.

There are also secondary sections and principles which could affect the consumer's position under fixed-term contracts, to which I now turn.<sup>362</sup>

#### *4.3 Consumer rights and other sections of the CPA, and relevant secondary principles that affect consumers under fixed-term agreements*

Under this heading, I highlight various relevant secondary aspects and provisions of the CPA that could possibly affect the position of parties in fixed-term contracts.<sup>363</sup> First, I deal with selected aspects of fairness. Part F of Chapter 2 of the CPA deals with the consumer's right to fair and honest dealing, and Part G of Chapter 2 regulates the consumer's right to fair, just, and reasonable terms and conditions. I will outline these aspects as they could affect parties under fixed-term agreements. I then consider matters such as *bona fides*, ubuntu, and public policy that affect the way fairness is interpreted and applied. I also highlight the importance of the plain language provision in section 22 of the CPA, and comment on the powers of courts to establish fairness. Thereafter, I mention the formal requirements of the CPA and summarise the effect of section 2(9) which deals with inconsistencies between provisions of the CPA and other legislation. Finally, I consider enforcement and jurisdictional aspects of the CPA that affect fixed-term contracts.

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<sup>360</sup> In addition, the consumer must be able to decide which remedies will work to his or her advantage – the statutory remedies or the common-law remedies or rights.

<sup>361</sup> See discussion in Ch 3 para 3.3.3.

<sup>362</sup> These aspects could be directly relevant to a fixed-term agreement under s 14 of the CPA. Under normal circumstances, however, they will be regarded as secondary factors for ease of organisation of this chapter.

<sup>363</sup> These sections, aspects, and principles could, in certain circumstances, be directly relevant and affect the consumer. However, under the standard fixed-term contract, such as a cell phone agreement, they would not normally be of primary interest.

#### 4.3.1 Introduction to fairness

In contract law, the fairness approach is based on collectivism,<sup>364</sup> and arose from the realisation that freedom of contract had only limited application,<sup>365</sup> was idealistic, and did not take collectivist and socio-economic realities into account.<sup>366</sup> The CPA applies the collectivist approach, for example, through the requirement of contractual fairness. In a system based on individualism, consumers must fend for themselves as contractual freedom and the maxims *caveat emptor* and *pacta servanda sunt* are applied rigorously, and it is irrelevant whether or not a contract is fair.<sup>367</sup> Because of the shift to collectivism,<sup>368</sup> Stoop argues the only way to effect fairness was to implement fairness as a contractual principle by way of legislation.<sup>369</sup>

Fairness is an abstract concept which is difficult to define with certainty.<sup>370</sup> The concept can be divided into many categories,<sup>371</sup> but for the purpose of this thesis I focus on procedural fairness<sup>372</sup> and on substantive or contractual fairness.<sup>373</sup>

First, I consider Part F of Chapter 2 of the CPA – the right to fair and honest dealing – which deals, in the main, with the procedural aspects of fairness. I then consider Part G of Chapter 2 as regards contractual fairness. Various other concepts, terms, and sections of the CPA which could potentially affect fairness are also considered before the role of plain language in effecting fairness and transparency and the power of courts to establish fairness are examined. I return to the role of sections 48 and 52(2) of the CPA as regards the parol evidence rule before drawing the discussion on fairness under the CPA to a close.<sup>374</sup>

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<sup>364</sup> See Ch 2 para 2.4.

<sup>365</sup> Based on the individualist approach, see Ch 2 para 2.4.

<sup>366</sup> See the discussion in Ch 2 paras 2.4.2 and 2.4.3.

<sup>367</sup> Another example is that s 14(2)(b)(i)(bb) entitles the consumer to terminate the fixed-term contract at any time by giving the supplier 20 days' notice. This negates the *pacta servanda sunt* maxim's application to the benefit of the consumer and embodies the collectivist principle. For a more detailed discussion of *pacta servanda sunt* see Ch 2 para 2.4.

<sup>368</sup> Chapter 2 para 2.4.

<sup>369</sup> Stoop *LLD* 211; also see Beatson & Friedman *Good Faith* 15; Harland (1991) *JILI* 207, 216.

<sup>370</sup> There is no definition in the CPA of fairness. For an analysis of the fairness concept of the CPA see Stoop *LLD* 5-234.

<sup>371</sup> For a detailed discussion of fairness, see Stoop *LLD* thesis 5-166. Although fairness plays an important role in contracts, it is discussed only briefly as this aspect does not form the main focus of this thesis.

<sup>372</sup> Mainly dealt with in Part F Ch 2 of the CPA.

<sup>373</sup> The terms 'contractual' and 'substantive' fairness are used interchangeably in this thesis. Contractual fairness is dealt with mainly in Part G of Ch 2 of the CPA.

<sup>374</sup> Because of the limited scope and focus of this thesis, I do not deal with Part E of Ch 2 of the CPA which deals with the right to fair and responsible marketing, Part H of Ch 2 dealing with fair value, good quality, and safety, and Part I of Ch 2 which regulates suppliers' accountability to consumers are also not addressed in detail. For an analysis of strict product liability in South Africa see Tennant *LLD* especially 89-188.

#### 4.3.2 *Right to fair and honest dealing*<sup>375</sup>

##### 4.3.2.1 *Introduction*

The right to fair and honest dealing is relevant to fixed-term contracts as all contracts under the CPA are considered for fairness, and should adhere to the provisions in sections 40 to 47 of the CPA. The obvious purpose of Part F of the CPA is to ensure fairness in CPA agreements – including fixed-term contracts – and promote the purpose and aims of the CPA,<sup>376</sup> the spirit and values of the Constitution, and the right to fair and honest dealing. The latter links to section 3 of the CPA, specifically the aims in sections 3(1)(c) to promote fair business practices, and section 3(1)(d) to protect consumers from unfair, unreasonable, and unjust trade practices, and fraudulent and deceptive conduct. A consumer in a fixed-term agreement can therefore also enforce his or her rights based on the right to fair and honest dealing.

##### 4.3.2.2 *Procedural fairness*<sup>377</sup>

###### 4.3.2.2.1 *Background to procedural fairness*

Procedural fairness implies fairness at the time of conclusion of the agreement. The circumstances relating to transparency, language requirements, and the format of the contract, must be fair and transparent to enable parties to protect their interests and to comply with the provisions of the CPA. Stoop contends that transparency has two components: transparency in respect of the contract terms;<sup>378</sup> and transparency in the proceedings leading to the consumer entering into the agreement.<sup>379</sup> When a consumer is not misled as to the quality of the goods, the price, and the nature of the agreement, there is transparency in respect of the proceedings leading to the conclusion of the agreement.<sup>380</sup>

Factors addressed by the CPA under both the right to fair and honest dealing and to procedural fairness are: unconscionable conduct,<sup>381</sup> misleading representations by suppliers,<sup>382</sup> fraudulent schemes and offers,<sup>383</sup> and pyramid and related schemes.<sup>384</sup> Procedural fairness is of specific importance in South Africa as many

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<sup>375</sup> Chapter 2, Part F of the CPA. The right to fair, just, and reasonable terms and conditions (known as contractual fairness) is discussed in the paragraph below. This heading deals with a different right.

<sup>376</sup> Sharrock (2010) *SA Merc LJ* 306.

<sup>377</sup> Sections 40-47 of the CPA are all relevant to this discussion—however, the emphasis in this discussion will be on s 40. For a discussion of procedural fairness see Stoop *LLD* 122-161.

<sup>378</sup> Transparency is discussed in para 4.3.2.5 below.

<sup>379</sup> Stoop *LLD* 213.

<sup>380</sup> Stoop *LLD* 213.

<sup>381</sup> Section 40 CPA.

<sup>382</sup> Section 41 CPA.

<sup>383</sup> Section 42 CPA.

<sup>384</sup> Section 43 of the CPA. See Stoop *LLD* 214-215 for a frame of reference to clarify and determine fairness.

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consumers do not have high levels of literacy or financial literacy<sup>385</sup> and are prone to be exploited by these factors.

Procedural fairness affects fixed-term contracts when a consumer is misled about the quality of the product.<sup>386</sup> For instance, the supplier tells the consumer who leases a tablet device that the tablet device has a 20-megapixel resolution camera, and the true resolution of the camera is a mere 3 megapixels.

#### 4.3.2.2.2 Section 40 of the CPA: Unconscionable conduct<sup>387</sup>

'Unconscionable', as it relates to conduct, is defined in section 1 of the CPA as meaning conduct of the character described in section 40, or otherwise conduct that is unethical or improper to such an extent that it would shock the conscience of a reasonable person.<sup>388</sup>

Glover investigated the origin of the unconscionability doctrine<sup>389</sup> and traced it back to the courts of equity in England.<sup>390</sup> He distinguishes the unconscionability in the CPA from that in England, Australia, and New Zealand in that the latter jurisdictions have both substantive and procedural requirements, while the CPA is limited to procedural requirements. He criticises section 40 for its apparent shotgun approach, instead of establishing a well-defined and specific doctrine, and warns of the danger in borrowing terminology or doctrine from foreign jurisdictions instead of having our courts examine and apply foreign law. In this instance, he argues, the legislature's approach was not sufficiently nuanced.<sup>391</sup>

Section 40 prohibits the use of physical force, coercion, undue influence, pressure, duress, harassment, unfair tactics, or similar unconscionable conduct by the

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<sup>385</sup> Stoop *LLD* 214.

<sup>386</sup> Section 41 CPA.

<sup>387</sup> Section 40 regulates unconscionability and reads as follows: 'Section 40.

- (1) A supplier or an agent of the supplier must not use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, in connection with any—
  - (a) marketing of any goods or services;
  - (b) supply of goods or services to a consumer;
  - (c) negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer;
  - (d) demand for, or collection of, payment for goods or services by a consumer; or
  - (e) recovery of goods from a consumer.
- (2) In addition to any conduct contemplated in subsection (1), it is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer's own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.
- (3) Section 51 applies to any court proceedings concerning this section.'

<sup>388</sup> Harland (1991) *JILI* 206-207; Glover (2013) *TSAR* 693-694; Naudé & Eiselen *Commentary* 40-2-40-3; Du Plessis (2012) *THRHR* 26-42.

<sup>389</sup> Glover (2013) *TSAR* 690-693.

<sup>390</sup> As opposed to the common-law courts. Glover (2013) *TSAR* 690-691.

<sup>391</sup> Glover (2013) *TSAR* 696-697.

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supplier when marketing, supplying, negotiating, concluding, executing, or enforcing the agreement. This also applies when the supplier demands or collects payment, or recovers goods from the consumer.<sup>392</sup>

The purpose of section 40 is to promote and improve procedural fairness in respect of consumer agreements, and to prevent suppliers from taking advantage of the vulnerability of consumers.<sup>393</sup> The unconscionability prohibition in the CPA reflects the common-law position on misrepresentation,<sup>394</sup> duress,<sup>395</sup> undue influence,<sup>396</sup> contracts induced by fraud,<sup>397</sup> and the unconscionable use of influence.<sup>398</sup> The scope of statutory unconscionability as defined and expanded by section 40, however, has a wider reach than the common-law position as it also covers the marketing, supply, collection of money in terms of the agreement, and the recovery of goods by the supplier from the consumer. It not only covers the actual negotiation and consensus, or lack thereof, but also the period preceding the agreement, and lasts until after cancellation when the supplier recovers the goods from the consumer.<sup>399</sup>

In the paragraph below I discuss substantive fairness.

#### 4.3.2.3 *The right to fair, just, and reasonable terms and conditions*<sup>400</sup>

##### 4.3.2.3.1 *Introduction*

Contractual fairness<sup>401</sup> implies fairness as regards the general content of the agreement. This can be assessed by considering whether the interests of the parties are evenly balanced, what the parties reasonably expect from the agreement,<sup>402</sup> and in general ensuring that the content of the agreement is fair and reasonable.<sup>403</sup>

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<sup>392</sup> Section 40 (1); see Glover (2013) *TSAR* 692-693.

<sup>393</sup> Stoop *LLD* 156; Naudé & Eiselen *Commentary* 40-3; Du Plessis (2012) *THRHR* 26-42. Also see Ch 5 para 5.3.2.2 and Ch 6 6.3.4.3.1.

<sup>394</sup> De Wet & Van Wyk *Kontraktereg* 51-53. See the discussion of this in Ch 3 para 3.2.14.

<sup>395</sup> Sharrock *Business Transactions* 143-145; Van Huyssteen et al *Contract* 111-118.

<sup>396</sup> *Mauerberger v Mauerberger* 1948 (4) SA 902 (C); *Preller & Others v Jordaan* 1956 (1) SA 483 (A); *Patel v Grobbelaar* 1974 (1) SA 532 (A). For a discussion of the historical development of undue influence and duress see Van Huyssteen et al *Contract* 118-124.

<sup>397</sup> De Wet & Van Wyk *Kontraktereg* 42-48.

<sup>398</sup> Sharrock *Business Transactions* 145-146. This reaffirms the underlying common-law principles of good faith and *boni mores* which are discussed below in para 4.3.2.4.

<sup>399</sup> Stoop *LLD* 156-157.

<sup>400</sup> Contractual fairness is dealt with in Part G of Ch 2 of the CPA. This term implies a welfarist approach to the interpretation of contracts as it implies an approach that aims to improve social justice and the financial well-being of the individual. See Hawthorne (2012) *THRHR* 361 for a detailed analysis of contractual (substantive) fairness. Also, see Stoop *LLD* 35-41, 92-122, 213.

<sup>401</sup> Substantive means 'important, serious, or related to real facts' see <https://dictionary.cambridge.org/dictionary/english/substantive> (date of use: 20 February 2019).

<sup>402</sup> Stoop *LLD* 213.

<sup>403</sup> Although ss 48-52 of the CPA are relevant, the emphasis in this discussion is on ss 48 and 51. For an evaluation of unfair contract terms provisions in the CPA see Sharrock (2010) *SA Merc LJ* 295-325. Stoop *LLD* 220 recommends that the grey list be included in the text of the CPA itself, rather than the Regulations.

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Contractual fairness is further divided into generalised and individualised fairness.<sup>404</sup> Generalised fairness implies that factors other than the contents of the agreement are considered, for instance, whether the price and terms of the agreement are market-related. This implies an objective assessment of the agreement. When fairness is measured in respect of the specific consumer as an individual, taking into account his or her welfare, individualised fairness<sup>405</sup> is at stake, which implies a more subjective assessment.<sup>406</sup>

*4.3.2.3.2 Section 48 of the CPA: Unfair, unreasonable, or unjust contract terms*<sup>407</sup>

Section 48(1)(a)(ii) of the CPA prohibits a supplier from entering into an agreement on terms that are unfair, unreasonable, or unjust.<sup>408</sup> Unfair, unreasonable, and unjust

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<sup>404</sup> Stoop *LLD* 213.

<sup>405</sup> Stoop *LLD* 213; s 3(1)(b) is an example of individualised fairness.

<sup>406</sup> Matters that will be considered in such an assessment are, eg, the vulnerability of the specific consumer in terms of s 3(1)(b). Barnard & Botha (2018) *SA Merc LJ* 231-235 opine that s 3(1)(b) also applies to trade unions. See the discussion in para 4.2.3.3 above.

<sup>407</sup> Section 48(1) 'A supplier must not –

- (a) offer to supply, supply, or enter into an agreement to supply, any goods or services –
  - (i) at a price that is unfair, unreasonable or unjust; or
  - (ii) on terms that are unfair, unreasonable or unjust;
- (b) market any goods or services, or negotiate, enter into or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable or unjust; or
- (c) require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer –
  - (i) to waive any rights;
  - (ii) assume any obligation; or
  - (iii) waive any liability of the supplier, on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.
- (2) Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if –
  - (a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;
  - (b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;
  - (c) the consumer relied upon a false, misleading or deceptive representation, as contemplated in section 41 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or
  - (d) the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 49 (1), and –
    - (i) the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or
    - (ii) the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49.'

<sup>408</sup> See Chadwick <https://www.derebus.org.za/contracting-liability-gross-negligence/> (date of use: 5 February 2020) for a discussion of whether it is possible to contract out of liability for gross negligence with reference to both the CPA and common law.

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terms are not defined in section 1 of the CPA.<sup>409</sup> Section 48(1)(c) further provides that a supplier must not require a consumer to accept terms that: waive any rights; assume obligations; or waive liability by the supplier, and which are unfair, unreasonable, or unjust, or render an agreement conditional upon these terms. Section 48(2) then continues to describe what would be regarded as unfair, unreasonable, or unjust.<sup>410</sup> First, terms that are excessively one-sided in favour of a person other than the consumer.<sup>411</sup> Second, when a term is so adverse that it is unfair to the consumer.<sup>412</sup> In addition, if the consumer relies to his or her detriment on misleading deceptive representations as contemplated in section 41,<sup>413</sup> or an opinion of the supplier (or someone acting on his or her behalf).<sup>414</sup> Last, if the transaction was conditional upon a term to the effect described above, or the fact, or the nature of the condition or the notice was not drawn to the attention of the consumer in terms of section 49.<sup>415</sup> Therefore, section 48 brings fairness into play at all stages of consumer negotiations and agreement, from the marketing stages of the transaction, through the negotiations, and even during the post-contractual stages of the agreement.<sup>416</sup>

The guidelines in section 48(2) are unfortunately not clear and precise enough to provide real guidance on their interpretation.<sup>417</sup> Hawthorne points out that section 48 is similar to the German *Generalklausel* and the French *la clause general*, the meaning of which must be interpreted by courts and the legislature.<sup>418</sup> She adds that this is another way constitutional principles can be implemented and infused into the private-law of contract.<sup>419</sup> Although the approach that section 48 is a general clause that must be interpreted by courts and the legislature is commendable and cannot be faulted in theory, it is unfortunately not of great practical value as it would normally not be plausible for an average consumer in an ordinary section 14 contract – eg, a dispute based on a cellphone agreement – to approach court.<sup>420</sup>

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<sup>409</sup> See Sharrock (2010) *SA Merc LJ* 307 for a critique on the use of the terms unfair, unreasonable and unjust. However s 48(2) provides some guidance on when a term or condition of a transaction or agreement is unfair, unreasonable or unjust – unfortunately the guidance is not clear.

<sup>410</sup> Sharrock (2010) *SA Merc LJ* 308-309; Naudé (2010) *SALJ* 515-519; Stoop *LLD* 92, 109-126; Stoop (2015) *SA Merc LJ* 212-215.

<sup>411</sup> Section 48(2)(a).

<sup>412</sup> Section 48(2)(b).

<sup>413</sup> Section 41 forms part of the umbrella right to fair and honest dealing. It regulates false, misleading, or deceptive representations. For a discussion of the common law related to misrepresentations, and sales talk, see Ch 3 para 3.2.14. For a detailed analysis of s 41 see Naudé & Eiselen *Commentary* 41-1–41-19.

<sup>414</sup> Section 48(2)(c). Opinion is not qualified, and therefore one cannot assume that the opinion must be incorrect. Every opinion is therefore covered by this section, and it could hold detrimental consequences for professional people, eg, chartered accountants and attorneys.

<sup>415</sup> Section 48(2)(d).

<sup>416</sup> Hawthorne (2012) *THRHR* 355. This of course implies that *bona fides* must be present at all stages of the agreement.

<sup>417</sup> Sharrock (2010) *SA Merc LJ* 308; Layton-McCann *LLM* 20.

<sup>418</sup> Hawthorne (2012) *THRHR* 345, 361.

<sup>419</sup> This could be beneficial in South Africa as well.

<sup>420</sup> See para 4.3.2.6.



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The timeframe to get to court, and the legal costs involved, are beyond the reach of the ordinary consumer and out of proportion to the duration and value of the agreement, and the amount in dispute. Therefore, Hawthorne's proposal would be of little practical use to the ordinary consumer, despite it being sound in principle.<sup>421</sup>

The Supreme Court of Appeal expressed itself clearly on contractual fairness in *Napier v Barkhuizer*<sup>422</sup> and *Brisley v Drotzky*<sup>423</sup> where it said that the value system created by the Constitution should be honoured by the courts. Although freedom of contract should be limited within acceptable and reasonable limits, parties should be allowed to conduct their own business, and there should not be unnecessary interference with these rights where parties have their own individual arrangements.<sup>424</sup> Hawthorne criticises the legislature in this regard for including measures to achieve substantive fairness in the CPA, she is of opinion that this points to a lack of respect for this principle as illustrated by the Supreme Court of Appeal in *Brisley* and *Napier*.<sup>425</sup>

Section 48 could also be interpreted as implying good faith,<sup>426</sup> which is not an officially acknowledged legal principle although there has been an international trend to include and imply good faith, especially in consumer-related transactions.<sup>427</sup> Substantive fairness can be established by considering, inter alia, the balance of interests between contracting parties compared to the value reflected in the agreement, default rules that apply, or the prevention of certain contract terms aimed at unfairly prejudicing the consumer.<sup>428</sup>

Contractual fairness can affect a consumer in a fixed-term agreement when, for instance, he or she must pay R15 000 for a cell phone that costs R5 000 at all other suppliers.

#### 4.3.2.3.3 Section 51 of the CPA: The 'black-list'

Section 51(1) provides a list of terms and conditions prohibited by the CPA, often described as a so-called 'black-list'.<sup>429</sup> Instead of identifying specific prohibited

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<sup>421</sup> In addition, s 52(1)(b) limits the powers of the court to decide on fairness disputes.

<sup>422</sup> 2006 (9) BCLR 1011 (SCA) para [13] and the Constitutional Court judgment 2007 (5) SA 323 (CC) (hereafter *Napier*). Also see the discussion of the *Napier* (CC) in *Mohamed's Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 (2) SA 314 (SCA) paras [14]–[16].

<sup>423</sup> 2002 (4) SA 1 (SCA) para [95] (hereafter *Brisley*).

<sup>424</sup> This, of course, differs from agreements that fall within the scope of pure collectivism, like s 14 CPA agreements.

<sup>425</sup> Hawthorne (2012) *THRHR* 360.

<sup>426</sup> See a brief discussion of good faith in para 4.3.2.4.1.

<sup>427</sup> For a recent Constitutional Court decision that considered good faith, its status and role in contract law locally and internationally, see *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* (CCT109/19) [2020] ZACC 13 (17 June 2020) [61–70] (hereafter *Beadica*). Also see the discussion in Ch 6 para 6.3.4.3.1.2.

<sup>428</sup> See Stoop *LLD* 212–215 for a discussion.

<sup>429</sup> For an analysis of the impact of the CPA on exemption clauses, see Richards *LLM* 60–95, 121–129.

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terms, it rather lists characteristics of prohibited terms. The supplier is prohibited from entering into an agreement, either a main agreement or any supplementary agreement, which in effect excludes the provisions of the CPA.<sup>430</sup> The purpose of section 51 is to prevent unfair, unjust, and unreasonable behaviour and contract terms by suppliers.

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<sup>430</sup> Section 51(1): 'A supplier must not make a transaction or agreement subject to any term or condition if –

- (a) its general purpose or effect is to –
  - (i) defeat the purposes and policy of this Act;
  - (ii) mislead or deceive the consumer; or
  - (iii) subject the consumer to fraudulent conduct;
- (b) it directly or indirectly purports to –
  - (i) waive or deprive a consumer of a right in terms of this Act;
  - (ii) avoid a supplier's obligation or duty in terms of this Act;
  - (iii) set aside or override the effect of any provision of this Act; or
  - (iv) authorise the supplier to –
    - (aa) do anything that is unlawful in terms of this Act; or
    - (bb) fail to do anything that is required in terms of this Act;
- (c) it purports to –
  - (i) limit or exempt a supplier of goods or services from liability for any loss directly or indirectly attributable to the gross negligence of the supplier or any person acting for or controlled by the supplier;
  - (ii) constitute an assumption of risk or liability by the consumer for a loss contemplated in subparagraph (i); or
  - (iii) impose an obligation on a consumer to pay for damage to, or otherwise assume the risk of handling, any goods displayed by the supplier, except to the extent contemplated in section 18(1);
- (d) it results from an offer prohibited in terms of section 31;
- (e) it requires the consumer to enter into a supplementary agreement, or sign a document, prohibited by subsection (2)(a);
- (f) it purports to cede to any person, charge, set off against a debt, or alienate in any manner, a right of the consumer to any claim against the Guardian's Fund;
- (g) it falsely expresses an acknowledgement by the consumer that –
  - (i) before the agreement was made, no representations or warranties were made in connection with the agreement by the supplier or a person on behalf of the supplier; or
  - (ii) the consumer has received goods or services, or a document that is required by this Act to be delivered to the consumer;
- (h) it requires the consumer to forfeit any money to the supplier –
  - (i) if the consumer exercises any right in terms of this Act; or
  - (ii) to which the supplier is not entitled in terms of this Act or any other law;
- (i) it expresses, on behalf of the consumer –
  - (i) an authorisation for any person acting on behalf of the supplier to enter any premises for the purposes of taking possession of goods to which the agreement relates;
  - (ii) an undertaking to sign in advance any documentation relating to enforcement of the agreement, irrespective of whether such documentation is complete or incomplete at the time it is signed; or
  - (iii) a consent to a predetermined value of costs relating to enforcement of the agreement, except to the extent that is consistent with this Act; or
- (j) it expresses an agreement by the consumer to –
  - (i) deposit with the supplier, or with any other person at the direction of the supplier, an identity document, credit or debit card, bank account or automatic teller machine access card, or any similar identifying document or device; or
  - (ii) provide a personal identification code or number to be used to access an account.'

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The important provisions in section 51 for the purpose of fixed-term agreements are the following:

- A contractual provision that excludes or attempts to exclude or limit the supplier's liability for loss of goods or services because of the gross negligence of the supplier.<sup>431</sup> This provision strips the supplier of his common-law right to exclude such liability.<sup>432</sup> Sharrock contends this provision only prohibits the exclusion of gross negligence, and not of negligence in the ordinary sense of the term.<sup>433</sup>
- The CPA also prohibits an obligation on a consumer to pay for the damage or assume the risk for the handling of goods displayed by the supplier, except as provided for in section 18(1).<sup>434</sup> Although this also infringes on the supplier's right to freedom of contract, the insertion of such a provision in an agreement would in any event be unreasonable and unfair.
- Another prohibition often encountered in common-law commercial contracts is the acknowledgement by the purchaser (in this case now the consumer) that no representations or warranties were made, or that he or she received goods or a document required by legislation. The CPA expressly prohibits false acknowledgements in section 51(1)(g). The supplier will, therefore, not be able to raise this protection which would have been unreasonable in any event in that it only affects false acknowledgements.
- A consumer may not forfeit money if he or she exercises any of his or her rights under the CPA.<sup>435</sup> This prohibition prevents the supplier from inserting penalty-type clauses and, of course, infringes the supplier's common-law right to freedom of contract and the principle of *pacta servanda sunt*.

A term which contravenes section 51 of the CPA is void to the extent that it contravenes the section – ie, only the 'offending' clause or term is excluded from the agreement, and the validity of the entire or the remainder of the agreement is not affected.

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<sup>431</sup> Section 51(1)(c). See Mupangavanhu (2014) *PELJ* 1167-1189 on exemption clauses and Tait & Newman (2014) *Obiter* 629-643.

<sup>432</sup> Tennant & Mbele <http://www.saflii.org/za/journals/DEREBUS/2013/17.pdf> (date of use: 29 May 2020).

<sup>433</sup> Sharrock *Business Transactions* 604.

<sup>434</sup> Section 51(1)(c). Section 18(1) provides that a consumer is only liable for damage caused by his or her gross negligence, reckless behaviour, or malicious or criminal conduct.

<sup>435</sup> Section 51(1)(h). This provision reminds one of roukoop or penalty-type common-law clauses. See Ch 3 para 3.2.11.

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In addition to the list of terms and conditions absolutely prohibited by the CPA, the legislature has added terms and conditions that are deemed to be unfair. These provide further guidance as to which terms to avoid in consumer contracts.

*4.3.2.3.4 Regulation 44(3) of the CPA: The 'grey list'*

Another attempt at relief in these situations is found in regulation 44(3), the so-called 'grey list' of terms deemed to be unfair.<sup>436</sup> This list serves as a guide to establish which terms could potentially be unfair. Like the 'black list' above, it too lists the characteristics of terms deemed to be unfair – eg, a term allowing the supplier an unreasonably long period in which to perform.<sup>437</sup> The list improves predictability regarding unfairness as it guides suppliers as to which terms to avoid in consumer agreements.

*4.3.2.4 Various other concepts, sections, and principles that potentially affect fairness*<sup>438</sup>

*4.3.2.4.1 Good faith*<sup>439</sup>

A discussion of unfairness and unconscionability would not be complete without a brief reference to good faith, as good faith in contract forms the basis of fairness, justness, reasonableness, and conscionability discussed above.<sup>440</sup> This principle developed from Roman law and ensures fairness in civil law.<sup>441</sup> A precise definition of this concept remained elusive until the decision in *Eerste Nasionale Bank van Suidelike-Afrika Beperk v Saayman NO*.<sup>442</sup> In *Saayman* Olivier JA, in his minority judgment, explained that the function of the *bona fide* rule was simply to give effect

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<sup>436</sup> For an analysis of the impact of the CPA on exemption clauses, see Richards *LLM* 60-95, 121-129.

<sup>437</sup> Reg 44(3)(p).

<sup>438</sup> See the *Beadica* judgment for a thorough, well considered and recent Constitutional Court judgment on the importance and role that factors such as constitutional rights, good faith, ubuntu, public policy and the *pacta servanda sunt* principle play in the application and interpretation of contract law.

<sup>439</sup> See the discussion of good faith in Ch 6 para 6.3.4.3.1.2.

<sup>440</sup> Naudé & Eiselen *Commentary* 40-3; *Beadica* [61-70]. A full analysis, or even a discussion of good faith falls outside the scope of this thesis. For a discussion of good faith in the law of contract, see Du Plessis (2018) *Stell LR* 379-419; Van der Sijde *LLM* 1-39; Louw (2013) *PELJ* 45-110; Hoeben A et al 'Ubuntu and the law' available at <https://www.ensafrica.com/news/Ubuntu-and-the-law-promoting-good-faith-and-fairness> (date of use: 4 October 2018); Brand (2009) *SALJ* 71-90; Nortje (2015) *TSAR* 571-577.

<sup>441</sup> For a discussion of *bona fides* see Van Huyssteen et al *Contract* 310-318; Hutchison (2011) *SALJ* 273-296; Du Bois et al *Wille's Principles* 737-734; Van Rensburg & Van der Merwe *Law of Contract* 9.

<sup>442</sup> 1997 (4) SA 302 (SCA) (*Saayman*) Hutchison *Good Faith* 213; Lubbe (1990) *Stell LR* 1, 7; Van der Merwe & Lubbe (1991) *Stell LR* 91; Van Huyssteen & Van der Merwe (1990) *Stell LR* 244; Carey Miller (1980) *SALJ* 531; *Eerste Nasionale Bank van Suidelike Afrika Beperk v Saayman NO* 1997 (4) SA 302 (SCA) (hereafter *Saayman*).

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to the public's opinion regarding respectability, reasonability, and fairness in contract law, in other words, the *boni mores*.<sup>443</sup>

In *Afrox Healthcare Bpk v Strydom*<sup>444</sup> Brand AJ ruled that although abstract maxims like *bona fides* underlie our law of contract, they are not independent rules of law, and therefore the court does not have a discretion to apply these abstract maxims.<sup>445</sup> More recently in *Four Wheel Drive Accessory Distributors CC v Rattan NO*,<sup>446</sup> the Supreme Court of Appeal confirmed that good faith was a basic underlying principle of our law which fulfils an explanatory or descriptive role in our law; a court cannot apply good faith as an independent rule on which to base its judgment.<sup>447</sup>

The role of good faith in the fairness requirements under the CPA and fixed-term contracts, is that the supplier and consumer must to act in good faith towards each other in the contract. In addition, this assists in complying with the requirements of fairness.<sup>448</sup>

#### 4.3.2.4.2 Ubuntu

Ubuntu is described by Du Plessis in her thesis<sup>449</sup> as follows:

‘... ubuntu does not entail a duty only on a contracting party to respect the human dignity of the other contracting party which duty has been linked to the principle of good faith, but also includes a duty on a contracting party to promote the realisation of the other contracting party's human dignity through the concept of substantive equality as informed by the post-apartheid constitutional context.’<sup>450</sup>

Ubuntu, therefore, plays an important role when a court applies the subjective test for fairness in agreements, as the court must simultaneously evaluate substantive

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<sup>443</sup> *Saayman* 319 where the court also referred to the comparative analysis in the earlier decision of *Bank of Lisbon and South Africa Ltd v De Ornelas and Another* 1988 (3) SA 580 (A) 612F-H where the court referred to Dutch law.

<sup>444</sup> 2002 (6) SA 21 (SCA) (hereafter *Afrox*).

<sup>445</sup> *Afrox* para [32]; Van Rensburg & Van der Merwe *Law of Contract* 9; Du Bois et al *Wille's Principles* 737-738.

<sup>446</sup> 2019 (3) SA 451 (SCA) (hereafter *Four Wheel Drive*).

<sup>447</sup> The court referred to the judgment by Brand JA in the *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) para [27], and to *Potgieter & Another v Potgieter NO & Others* 2012(1) SA 637 (SCA) para [32] to support this view, *Four Wheel Drive* paras [27]-[28]. Also see *Stoop LLD* 63-64.

<sup>448</sup> See *Stoop LLD* 210. Du Plessis, in her *LLD* 391, argues that the development of the constitutional value of human dignity, whilst simultaneously valuing freedom and the rule of law, could ultimately result in good faith becoming an independent substantive rule. This could, in turn, be used when evaluating fairness in contracts – and could lead to unfair terms, or the unfair enforcement of such terms, being set aside. Also see the discussion of good faith in Ch 6 para 6.3.4.3.1.2.

<sup>449</sup> Du Plessis *LLD* 383.

<sup>450</sup> See Du Plessis *LLD* 383-384. Also see *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 para [71]; Muphangavanhu (2015) *De Jure* 124-125, 135; Bhana *PhD* 105-106, 114, to name but a few. See Bhana *PhD* for a detailed study of constitutionalising contract law.

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equality in contract law.<sup>451</sup> Du Plessis observes that ubuntu is fundamental to the subjective test for fairness,<sup>452</sup> and, that it is essential to consider ubuntu for the purposes of the CPA. She argues that ubuntu was used by implication by the Constitutional Court in *Botha and Another v Rich NO and Others*<sup>453</sup> even if the court based its decision on good faith.<sup>454</sup> This accentuates the link between ubuntu, public interest, and good faith necessary to establish substantive fairness in contracts.<sup>455</sup>

One might argue that ubuntu, which is generally accepted and applied by courts, could perhaps in time incorporate the common-law good-faith principle,<sup>456</sup> which is viewed as controversial by some, and not always implemented by courts to effect fairness. Perhaps the solution to the good-faith controversy is to view ubuntu as a collectivist good-faith principle with constitutional ideals that has replaced the classic good-faith principle of our traditional common law, in the move from the classic contract theory to a collectivist approach.

#### 4.3.2.4.3 Public policy and *boni mores*

The concepts of public policy and *boni mores* play a role in establishing fairness, unconscionability, constitutional values, and the purpose, policy and aims of the CPA.<sup>457</sup>

Public policy can be described as the guidelines, rules, or principles a specific government uses to establish, apply, and interpret their policies, legislation, or adjudication.<sup>458</sup> It can also be argued that the Constitution is the embodiment of public policy.<sup>459</sup>

The purpose of *boni mores*, on the other hand, is to establish the moral views of the community or country on a specific matter,<sup>460</sup> and normally, depending on the *pro rata* size of the community or part of the population in question, reflects to a certain extent public opinion,<sup>461</sup> public interest, and ultimately public policy.<sup>462</sup> *Boni mores*

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<sup>451</sup> Du Plessis LLD 295, 382-385.

<sup>452</sup> Du Plessis LLD 294, 383, also see Cornell & Muvangua *uBuntu and the Law* 24.

<sup>453</sup> 2014 (4) SA 124 (CC) (hereafter *Rich*) para [46].

<sup>454</sup> Du Plessis LLD 298-299, 383-384.

<sup>455</sup> *Rich* para [46].

<sup>456</sup> Du Plessis LLD 383.

<sup>457</sup> Because this thesis does not focus on fairness these terms are dealt with very briefly.

<sup>458</sup> See <https://www.merriam-webster.com/dictionary/public%20policy> (date of use: 21 February 2019); <https://www.definitions.net/definition/public+policy> (date of use: 15 October 2019).

<sup>459</sup> *Barkhuizen v Napier* 2007(5) SA 323 (CC) para [28] (hereafter *Barkhuizen*); Stoop LLD 66.

<sup>460</sup> For instance on abortion, religion, corruption, and other matters of moral concern.

<sup>461</sup> *Barkhuizen* para [73].

<sup>462</sup> Joubert *General Principles* 132 indicates that good morals do not necessarily refer to morality in the sexual sense. An example would be that unlawful conduct, for example duress when entering into an agreement, is viewed as morally wrong by the public, and therefore is viewed as *contra bonos mores*. This same action will also be against public interest as it is not desirable that these contracts be allowed as it will be detrimental to members of the public. At the same time, public policy could also reflect that this conduct is unacceptable – eg, the fairness and unconscionability prohibitions in the CPA that reflect the legislature's take on the situation.

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reflects the interests of a sector of, or the public as a whole (public interest) and ultimately when government reacts by way of codes or legislation to implement or regulate this view of the public as a whole, it becomes public policy, for instance on matters like good corporate governance.<sup>463</sup> The concepts of public policy and *boni mores* have contributed to the purposes and aims of the CPA which benefit consumers in fixed-term agreements. I will now analyse the plain language provisions of the CPA.

### 4.3.2.5 Plain language<sup>464</sup>

Section 22 of the CPA, which falls under Part D of the CPA, is part of the consumer's right to disclosure and information, and provides that the agreement must be in plain and understandable language.<sup>465</sup> This means that an ordinary consumer within the target audience of a product or service, with average literacy skills,<sup>466</sup> who does not have extensive experience in consumer agreements, should be able to understand the contents and consequences of an agreement or a notice without undue effort.<sup>467</sup> The purpose of section 22 is clearly that the consumer must be able to understand the contents and effects of the contract, in other words it contributes towards transparency.<sup>468</sup> This requirement promotes substantive and procedural fairness, and that the parties enter into the contract in good faith.<sup>469</sup> The burden of ensuring that the consumer understands the language and the financial implications of the transaction has now shifted from the consumer – previously known in the common law as the *caveat emptor* or *caveat subscriptor* maxims – to the supplier who must explain these aspects to the consumer.<sup>470</sup>

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<sup>463</sup> For instance the King Codes on good corporate governance in company law available at <https://www.saica.co.za/Technical/LegalandGovernance/King/tabid/2938/language/en-ZA/Default.aspx> (date of use: 6 February 2020).

<sup>464</sup> For a discussion of plain language in legislation and in the CPA, see Gouws (2010) *SA Merc LJ* 79-94. This is especially important from a practitioner's point of view to assist in the drafting of contracts, see De Stadler & Van Zyl (2017) *SA Merc LJ* 95-127. For a detailed discussion of plain language see Naudé & Eiselen *Commentary* 22-1–22-17 and Stoop & Churr (2013) *PELJ* 514-553.

<sup>465</sup> See Stoop & Churr (2013) *PELJ* 518-547.

<sup>466</sup> See Naudé & Eiselen *Commentary* 22-5–22-6.

<sup>467</sup> Naudé & Eiselen *Commentary* 22-4–22-5.

<sup>468</sup> Stoop *LLD* 129. The test to establish if a document adheres to the requirements in s 22 is subjective, see s 22(2) of the CPA.

<sup>469</sup> The duty to disclose information could be associated with the good faith principle, see Nortje (2015) *TSAR* 571-577. See Stoop *LLD* 206 for an analysis of the position in England and see para 4.3.2.4.1 above for a brief discussion of good faith in consumer contracts.

<sup>470</sup> Section 50(2)(b)(ii) of the CPA which provides that financial obligations have to be set out clearly, and an itemised breakdown of the financial obligations must be provided to the consumer. See Tennant & Mbele <http://www.saflii.org/za/journals/DEREBUS/2013/17.pdf> (date of use: 29 May 2020); Nortje (2015) *TSAR* 567-582; Otto (2014) *THRHR* 159-163 on the obligation on credit providers in terms of ss 64(1) and 64(2) of the NCA, which is similar to the principles in s 22 of the CPA.

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It is uncertain what the effect on a consumer agreement will be when the requirements in section 22 are not followed.<sup>471</sup> Section 22 is important, and will benefit consumers in fixed-term contracts as the supplier will have to explain all material terms of the agreement to the consumer, including the financial implications. Section 22 aids transparency, for instance, the monthly invoice amounts for fixed-term contracts like cell phone invoices, and how these are calculated, will have to be explained to the consumer.

The plain language requirement assists a consumer under a fixed-term agreement as it is information-based consumer protection which enables a consumer to establish his or her rights and obligations under a specific contract.

It is ironic that the CPA, which purports to promote intelligibility in consumer agreements and notices, is generally regarded as difficult to read and understand.<sup>472</sup>

#### 4.3.2.6 *The power of the court to establish fairness: Section 52*

In all disputes in agreements under the CPA, the court is the consumer's option of last resort as he or she must first exhaust all the fora in the sequence provided in section 69.<sup>473</sup> However, the heading of section 52 in the CPA reads: 'Powers of court to ensure fair and just conduct, terms, and conditions.'<sup>474</sup>

Section 52 empowers courts to hear matters based on unfairness or injustice, or which can be regarded as unconscionable.<sup>475</sup> The powers to adjudicate on these matters are only provided to courts, and not to any other body established in terms

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<sup>471</sup> Naudé & Eiselen *Commentary* 22-13–22-14. The following are possible arguments:

- When the consumer does not understand the terms and conditions of the agreement there is no consensus, and therefore no valid and binding contract. See Ch 3 para 3.2.4.
- An agreement the consumer does not understand may be regarded as unfair in terms of s 48.
- An agreement that does not comply with s 22 contravenes s 50(2)(b)(i) which reinforces the requirement in s 22. In terms of s 50(3) such an agreement, or the relevant term, could be void. See Naudé & Eiselen *Commentary* 22-13–22-14.
- Section 51(3) provides that an agreement that contravenes s 51 is not valid to the extent that it does not comply with s 51.
- Finally, the plain language requirement is listed as one of the factors in s 52 by which to establish fairness. As a result, the agreement will not necessarily be void because of non-compliance with s 22. See Naudé & Eiselen *Commentary* 22-13–22-14.

<sup>472</sup> Du Preez (2009) *TSAR* 82; Delport (2014) *Obiter* 61; Van Heerden & Barnard (2019) *THRHR* 465.

<sup>473</sup> *Joroy 4440 CC t/a Ubuntu Procurement v Potgieter NO and Another* 2016 (3) SA 465 (FB) (hereafter *Joroy*). See Scott *LLD* 49-50.

<sup>474</sup> Under the definitions in s 1 of the CPA the term 'court' does not include a consumer court. A 'consumer court' is defined in s 1 as 'a body of that name, or a consumer Tribunal, that has been established in terms of applicable provincial legislation'.

<sup>475</sup> When the consumer alleges a supplier has contravened ss 40 or 48 of the CPA. Section 52(1)(a) CPA. See Scott *LLD* 98-100 and Van Heerden & Barnard (2011) *JICL* 136-138.



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of the CPA.<sup>476</sup> As the National Consumer Commission<sup>477</sup> and the National Consumer Tribunal<sup>478</sup> are statutory bodies, they have only those powers conferred on them by specific legislation. This creates the unique situation in which a consumer can approach a court directly if his or her complaint or action is based on the alleged lack of fair and just conduct, terms, or conditions of the agreement.<sup>479</sup>

This creates the ideal opportunity to bypass the time-consuming procedures in section 69 of the CPA, as the consumer can base his or her claim on unfairness, injustice, or unconscionability. This will save the consumer time, although it may prove a more costly alternative. In addition, a consumer should not find it difficult to base his or her claim on unfairness, injustice, or unconscionability as provided in section 52.

Section 52(1) provides that the court can consider fairness when a person (the consumer) alleges that:

- the supplier contravened sections 40, 41 and 48;<sup>480</sup> and
- in addition, if the CPA does not provide another remedy to correct the alleged prohibited conduct, unfairness, injustice, or unconscionability;<sup>481</sup>
- after the court has considered the principles purposes and provisions of the CPA;<sup>482</sup>
- and the matters mentioned in section 52(2),<sup>483</sup>

the court may make an order in terms of section 52(3).

The restriction in section 52(1)(b) on the powers of the court to ensure fair and just conduct, terms, and conditions, imply that this is a remedy of last resort for the consumer. Therefore, the court is severely restricted in the use of these powers to grant an order in terms of section 52(3), and does not provide the consumer with an easily accessible alternative to access adjudication by a court, or a remedy to the fairness provisions in the CPA. Section 52(3) may even be interpreted to mean that a consumer must exhaust his or her remedies under section 2(10) of the CPA as well, before approaching the court based on fairness. This is unfortunate, for instance, when the supplier does not perform its duties at all, in a fixed-term

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<sup>476</sup> Section 52 CPA.

<sup>477</sup> Commission, established in terms of s 85 of the CPA. For more information see the Commission's official website <http://www.thencc.gov.za/welcome> (date of use: 5 February 2020).

<sup>478</sup> Tribunal, established in terms s 26 of the National Credit Act 34 of 2005 (NCA).

<sup>479</sup> See Hawthorne (2013) *Fundamina* 300, 319 where she regards the consideration of public policy in order to establish fairness as an English law import.

<sup>480</sup> Section 52(1)(a) CPA.

<sup>481</sup> Section 52(1)(b) CPA.

<sup>482</sup> Section 52(1)(b) CPA.

<sup>483</sup> However, s 52(2) of the CPA lists factors a court must take into account when deciding a dispute based on ss 40, 41 and 48. For the full list of these circumstances, see s 52(2). Also see the discussion in para 4.3.2.7 below regarding the effect of s 52 on the parol evidence rule.

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agreement under section 14 of the CPA, or when the supplier defaults. The consumer is left without a remedy in these circumstances.<sup>484</sup>

I now consider the effect of certain fairness provisions on the parol evidence rule.

*4.3.2.7 The effect of the fairness provisions of the CPA on the parol evidence rule*

The effect of section 48(1)(a)(i), 48(1)(b), 48(2)(c), and 48(2)(d)(i) and (ii), and section 52(2)(a)-(j) of the CPA is that extrinsic evidence may be presented to court in the circumstances provided for in the sections, to establish whether the terms of the agreement are unfair, unjust, or unreasonable.<sup>485</sup> This, of course, affects the parol evidence rule.<sup>486</sup> The parol evidence rule provides that no extrinsic evidence is allowed in a dispute to interpret a written agreement between parties.<sup>487</sup> This rule still forms part of the South African common-law of contract.<sup>488</sup>

The effect of the sections above on the parol evidence rule is commendable, and should apply to all consumer agreements, whether the dispute is based on these sections or not. The parol evidence rule potentially affects consumers adversely, as they are in a less favourable bargaining position when concluding a consumer agreement<sup>489</sup> in that consumer agreements virtually always take the form of standard-form contracts which cannot be negotiated individually.

A provision that expressly abolishes the parol evidence rule in respect of all consumer agreements under the CPA will provide welcome relief to consumers. Such a provision will benefit the consumer, and avoid uncertainty regarding the application of the parol evidence rule, as it will allow all relevant documents, facts, and representations as evidence to assist a consumer in proving his or her case.<sup>490</sup> In particular, consumers in fixed-term contracts will benefit from such a provision, as they invariably have to enter into standard form contracts – eg, cell phone contracts.

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<sup>484</sup> See the discussion in para 4.2.3.7 above.

<sup>485</sup> See Levenstein & Barnett (2010) *Without Prejudice* 30-31.

<sup>486</sup> See the discussion of the parol evidence rule in Ch 3 para 3.2.9. Also see Tennant & Mbele <http://www.saflii.org/za/journals/DEREBUS/2013/17.pdf> (date of use: 29 May 2020).

<sup>487</sup> Also known as parol evidence. Du Bois et al *Wille's Principles* 807; Bradfield *Christie's Law of Contract* 226.

<sup>488</sup> See the discussion of parol evidence in Ch 3 para 3.2.9. Also see *KPMG* para [39]; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para [12]. Hutchison et al *Law of Contract* 263-265; *Johnston v Leal* 1980 (3) SA 927 (A); *Delmas Milling Co Ltd v Du Plessis* 1955 3 SA 447 (A).

<sup>489</sup> See Ch 2 para 2.5; South African courts and parliament have acknowledged inequality of bargaining power. Aronstam *Freedom of Contract* 23-24; *Linstrom v Venter* 1957 (1) SA 125 (SWA) 127-128, 131.

<sup>490</sup> See Bekker *LLD* 530-532.

#### 4.3.2.8 Concluding remarks: Fairness

Although the inclusion of the fairness provisions in the CPA is commendable, there are many provisions that still can give rise to uncertainty.<sup>491</sup> Despite these criticisms, the position of the consumer has definitely improved with the inclusion of these provisions. The plain language provisions are commendable, as these are now implemented in many international jurisdictions and contribute towards fairness because consumers are better informed.<sup>492</sup> It is unfortunate that the powers of the courts to issue an order based on fairness are limited in section 52(1)(b) of the CPA, as that places this remedy out of the reach of most consumer disputes because of the time- and cost limitations. In addition, courts and other bodies should be afforded the powers to consider fairness *mero motu*<sup>493</sup> as that would improve access to justice, and simultaneously give effect to constitutional aims and purposes. The effect of sections 48<sup>494</sup> and 52(2) on the parol evidence rule is commendable, and the limitation of the parol evidence rule should be widened to all agreements under the CPA to ensure effective consumer protection.

#### 4.3.3 Other provisions of the CPA that could potentially affect fixed-term agreements under section 14 of the CPA.

##### 4.3.3.1 Section 17

When one reads section 17 of the CPA dealing with the consumer's right to cancel advance reservations, bookings, or orders, the natural question arising is whether the section could affect fixed-term contracts under section 14. However, on closer inspection the section appears to deal exclusively with once-off bookings, orders, and reservations, and not with fixed-term contracts.

##### 4.3.3.2 Section 21

Another section that comes to mind is section 21, which deals with unsolicited goods and services,<sup>495</sup> and more specifically section 21(1)(b) which refers to the periodic delivery of goods during the life of an agreement. However, the section will only affect unsolicited goods, and not the goods or services agreed upon in the fixed-term agreement.

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<sup>491</sup> For criticism see Stoop *LLD* 213-214; Mupangavanhu (2015) *De Jure* 129-135.

<sup>492</sup> This is based on information-based consumer protection principles. See Ch 5 para 5.3.2.2 for the position in Singapore, and Ch 6 para 6.3.4.3.1.6 for the position in the UK.

<sup>493</sup> See the discussion of this aspect in Ch 6 para 6.3.4.3.1.1.

<sup>494</sup> Sections 48(1)(a)(i), 48(1)(b), 48(2)(c) and 48(d)(i) and (ii) CPA.

<sup>495</sup> For more information on unsolicited goods see Stoop & Taylor (2015) *THRHR* 296-305.

#### 4.3.3.3 Section 19(6)

Section 19(6)<sup>496</sup> of the CPA provides that when a supplier tenders delivery of goods or services at a date or time other than that agreed upon, the consumer may either accept such delivery, or still require delivery to take place at the agreed place and time if the date and time have not passed, or, the consumer can cancel the agreement without penalty, treating the goods as unsolicited goods under section 21. In practice the effect of section 19(6)(c) is that when the supplier does not tender delivery, the consumer will still have to give notice in terms of section 14(2)(b)(i)(bb), must pay the amounts owed up to cancellation of the agreement,<sup>497</sup> is liable for the cancellation penalty,<sup>498</sup> and will not be entitled to make use of the remedy in section 19(6)(c). This is a serious oversight, and the section should have been worded similarly to section 28(6) of the CRA to effectively protect the consumer when the supplier does not tender delivery.<sup>499</sup>

#### 4.3.3.4 Sections 54, 55 and 56 of the CPA and voetstoets clauses

Section 54 provides that services are warranted, including goods that were installed or maintained as part of or required for the service provided. In addition, section 55(2) read with section 56, provides that suppliers warrant goods for six months. Section 57 further provides that parts, whether new or reconditioned, are guaranteed for at least three months. These sections could, therefore, negate the operation of the *voetstoets* clause,<sup>500</sup> which would be to the advantage of consumers in fixed-term agreements and, of course, consumers in general.

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<sup>496</sup> Section 19(6): 'If the supplier tenders the delivery of goods or the performance of any services at a location, on a date or at a time other than as agreed with the consumer, the consumer may either—

(a) accept the delivery or performance at that location, date and time;  
(b) require the delivery or performance at the agreed location, date and time, if that date and time have not yet passed; or  
(c) cancel the agreement without penalty, treating any delivered goods or performed services as unsolicited goods or services in accordance with section 21.'

<sup>497</sup> Section 14(3)(a) CPA.

<sup>498</sup> Section 14(3)(b)(i) CPA.

<sup>499</sup> See the discussion of s 28(6) of the CRA in Ch 6 para 6.3.4.2.4.

<sup>500</sup> Stoop (2018) *THRHR* 650-660; Barnard (2012) *De Jure* 455-484; Kruger *LLM* 78; Tennant & Mbele <http://www.saflii.org/za/journals/DEREBUS/2013/17.pdf> (date of use: 29 May 2020). See also <https://www.fin24.com/PersonalFinance/Property/No-longer-as-is-for-voetstoets-law-20100718> (date of use: 15 April 2019). For an argument that *voetstoets* could still be applicable in certain circumstances under the CPA, see Morissey & Coetzee (2010) *Without Prejudice* 12-13; also, see Brown <https://www.golegal.co.za/voetstoets-clause-cpa/> (date of use: 25 February 2020) for the effect of s 55 on the sale of immovable property; and Kloppers <https://www.fin24.com/PersonalFinance/Property/No-longer-as-is-for-voetstoets-law-20100718> (date of use: 23 February 2020); Mukheibir <https://www.mondaq.com/southafrica/Intellectual-Property/897966/The-Voetstoets-Clause> (date of use: 3 March 2020); Otto (2011) *THRHR* 525-545. See para 3.2.12.1.

#### 4.3.3.5 Section 19(2)(c)

Section 19(2)(c) provides that the supplier is liable for the loss of goods prior to their delivery to the consumer, and that the supplier must keep the goods in its care and at its risk until delivery to the consumer, thereby negating the effect of the common-law passing-of-risk rule.<sup>501</sup>

This section obviously benefits consumers in fixed-term contracts, as the consumer cannot be held liable when, for instance, the cell phone he or she bought is destroyed before delivery.

#### 4.3.4 Formalities

The CPA prescribes formalities in the form of compulsory disclosure of certain information and requirements related to the way in which the information is disclosed.<sup>502</sup>

These formalities serve the purpose of

‘reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented’.<sup>503</sup>

The prescription of standardised forms for notices and documents required in terms of legislation increases consumer protection because basic information is to be presented in a uniform format, making it less likely that consumers will be misled. For instance, when a consumer enters into a fixed-term contract for a cell phone the prescribed information is available to the consumer in the agreement, and in the further prescribed notices.<sup>504</sup>

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<sup>501</sup> The common-law passing of risk rule entails that the risk of profit and loss passes from the seller to the purchaser when the sale is complete, in other words once the price is determined, the subject of the purchase is definite, and suspensive conditions have been fulfilled. In practice this will normally be once the agreement has been concluded (in other words before delivery of the res), see Du Bois et al *Wille's Principles* 894; De Wet & Van Wyk *Handelsreg* 347-348; Sharrock *Business Transactions* 290-292; Tennant & Mbele <http://www.saflii.org/za/journals/DEREBUS/2013/17.pdf> (date of use: 29 May 2020).

<sup>502</sup> For instance, the plain language requirement, s 22 CPA, as well as the other sections in Part D of chapter 2 of the CPA. These requirements mainly deal with information that must be provided to the consumer, for instance regarding the disclosure of the price of goods or services in s 23, product labelling and trade descriptions in s 24, the disclosure of reconditioned and grey mark products in s 25, the keeping of sales records in s 26, the disclosures required by intermediaries in s 27, and the identification of deliverers, installers and other persons in s 28.

<sup>503</sup> Section 3(1)(b)(iv). *Green Paper* 31; also see Ch 5 para 5.3.2.2 and Ch 6 para 6.3.4.3.1.

<sup>504</sup> See for instance ss 26, 49 and 50 of the CPA.

The language used in the CPA will now be discussed to gauge its effect on the rights and position of consumers in fixed-term contracts.

#### 4.3.5 *Remarks on the language in the CPA*

When the aims of the CPA in section 3(1) are read and analysed, they are similar in one respect, they create the impression that the legislature is patronising the consumer by simply attempting to protect him or her.<sup>505</sup> The consumer has no choice but to play a very dependent and passive role and he or she is not effectively empowered by providing him or her with substantial rights and remedies that he or she can actively use to enforce his or her rights.<sup>506</sup> The sophistication and financial literacy levels of consumers differ, and the CPA should be flexible enough to effectively protect, assist, and empower all levels of consumer, and not merely attempt to protect the most vulnerable – an approach which will ultimately result in no consumer having effective, active, and empowering rights he or she can pursue.

The most helpful wording in this regard is in section 3(1)(f) which states that the consumer's empowerment must be promoted. However, nowhere in section 3 does it state what rights the consumer actually has or exactly how this empowerment will be achieved. A relevant question is, therefore, how a consumer can be empowered without providing or stating his or her rights, and expressly stating how he or she can act to exercise those rights effectively?

To truly empower a consumer he or she must be well-informed, literate, financially literate, able to act pro-actively, actively, and independently inasmuch as he or she is able to do so, to enforce his or her remedies for true knowledge, confidence and ultimately empowerment to succeed, otherwise he or she remains passive, disempowered, dependent, and a victim regardless of the legislature's good intentions.

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<sup>505</sup> Du Preez (2009) *TSAR* 63; Woker (2016) *SA Merc LJ* 21 n 1, where she mentions that in the South African regime, the consumer is the most protected in the world. See Christie & McFarlane *Law of Contract* 14-15 where there is a warning against a paternalistic approach.

<sup>506</sup> See Du Preez (2009) *TSAR* 6. The distinction between consumer protection and consumer rights in the UK is emphasised by Andrews. She contends the main difference lies in the way rights on the one hand, and protections on the other, are enforced. A right implies the consumer has full freedom to enforce his or her right or claim where and when he or she chooses, the consumer is not obliged to obtain consent to institute the claim, and the claim is not subject to prior approval. Protection on the other hand does not inevitably imply a right, and may, for instance, imply that a regulatory body can, or must take action and the consumer does not necessarily benefit directly, although he or she may, in the longer term, benefit indirectly from action taken by the regulatory body. Therefore, the main difference lies therein that a right effectively empowers a consumer. See <http://competitionpolicy.ac.uk/documents/107435/107584/file50027.pdf> (date of use: 10 August 2019) especially 107-108. Protection normally implies a more passive role for the consumer. For a general discussion see Andrews *Enforcement* 1.

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The CPA aims to educate the consumer;<sup>507</sup> that is commendable, and the first step to empower the consumer.<sup>508</sup> An idealistic Constitution and CPA alone, with admirable and well-intended aims and purposes, although politically correct, will not do this. The exploitation of vulnerable consumers is deplorable conduct and should not be allowed. Furthermore, the aim to protect the most vulnerable consumers in section 3(1)(b) is also a step in the right direction, and vulnerable consumers will therefore be protected. However, after protection, information and education, consumers should have effective rights and powers, and be independent and responsible consumers. That should be the ultimate goal of the CPA.<sup>509</sup>

The CPA needs to go one step further if it is truly to empower consumers. Adequate literacy and financial literacy are important to allow consumers to participate in the economy independently. Financial literacy entails knowledge and skills to comprehend how the economy works, how income is earned and how to act responsibly with money. Pearson *et al* describe it as 'the set of skills and knowledge that allows people to make informed and effective decisions with all of their financial resources'.<sup>510</sup> It is essential and urgent that basic financial literacy be promoted in South Africa. A basic questionnaire that establishes whether a consumer understands the basic consequences of a transaction or agreement could for instance be a prerequisite 'qualification' to open a bank account, apply for a loan, and enter into an agreement in terms of section 14. In addition, basic financial literacy should be taught at school level as a basic life skill.<sup>511</sup>

Adequate literacy and financial skills will ultimately contribute to the independence and empowerment of consumers and benefit the community at large.<sup>512</sup>

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<sup>507</sup> The preamble states that the CPA aims to 'improve access to, and the quality of, information that is necessary so that consumers are able to make informed choices ...' and also to 'promote and provide consumer education,...'.

<sup>508</sup> However, and as this does not fall within the scope of this work and I will not discuss this in detail, it should be mentioned that the most important measure to effect the empowerment of consumers is to effect literacy by way of a sound and effective education system at grassroots level that delivers educated and well-informed students. Political and socio-economic ideals can unfortunately not be realised by a Constitution and idealistic, though well-intended, legislation alone. This fact is acknowledged by the legislature by implication in the preamble to the CPA.

<sup>509</sup> See Du Preez (2009) *TSAR* 65 who contends that the CPA focuses strongly on entitlements for consumers.

<sup>510</sup> Pearson *et al* (2017) *PELJ* 2-3; [https://en.wikipedia.org/wiki/Financial\\_literacy](https://en.wikipedia.org/wiki/Financial_literacy) (date of use: 15 February 2019).

<sup>511</sup> Pearson *et al* (2017) *PELJ* 3. It could also be promoted by way of television programs/clips, radio promotions, competitions, cellphone apps/promotions, billboards, etc. Until higher standards of literacy and financial literacy are achieved, it is recommended that suppliers make use of automated recordings in booths that can be operated by consumers independently, to listen to recordings of explanations, consumer literacy, and financial literacy information, and education. The consumer should then after having listened, confirm his or her understanding on the recording and/or answer a few basic questions to evaluate his or her understanding of the agreement/procedure. This enables suppliers to inform consumers and to keep record of compliance in the event of disputes.

<sup>512</sup> See the Financial Sector Conduct Authority (FSCA), previously the Financial Services Board (FSB) survey and investigation into financial literacy in South Africa available at <https://www.fscaconsumered.co.za/Resources/Research%20Documents/FSB%20Financial%20Lit>

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Responsibilisation, literacy, and financial literacy are not attained overnight and will be a continuous and long-term project, but ultimately, it is the only way to attain informed, independent, responsible and empowered consumers. Along with the protection and effective empowerment of consumers, this should be a priority.<sup>513</sup>

The lack of true empowerment in the CPA, and in section 14, by merely protecting the consumer, and not providing the consumer with effective rights, could therefore be a factor that contributes to the lack of effective remedies to assist the consumer when the supplier materially malperforms.

#### 4.3.6 Section 2(9)

Section 2(9) provides that if a section of the CPA and another Act or Acts apply and these provisions are inconsistent, the section that best protects the consumer will prevail. This is in line with the aims and purpose of the CPA, and the purpose of section 2(9) clearly is to protect the consumer.<sup>514</sup>

I have now dealt with a number of secondary factors that might affect a consumer under a fixed-term contract. I will now briefly highlight a few relevant aspects of the enforcement of the CPA.<sup>515</sup>

#### 4.3.7 Enforcement

##### 4.3.7.1 Enforcement other than by a court

A consumer must follow the sequence of prescribed enforcement agencies in section 69 of the CPA.<sup>516</sup> To enforce a right or resolve a dispute the consumer starts by approaching the Tribunal if permitted in the particular dispute.<sup>517</sup> Alternatively, he or she must refer the dispute to the ombud with jurisdiction,<sup>518</sup> or the provincial consumer court which has jurisdiction – if there is one.<sup>519</sup> Failing this the consumer can refer the matter to an alternative dispute resolution agent under section 70.<sup>520</sup> After this, he or she can file a complaint with the Commission in terms of section

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eracy%20Report%202015.pdf (date of use: 15 February 2019) and also their consumer website <https://www.fscaconsumered.co.za/> (date of use: 15 February 2019).

<sup>513</sup> Financial literacy depends on the disclosure of information. See Pearson et al (2017) *PELJ* 2-55 on this aspect as a full discussion of information, financial literacy, etc, falls outside the scope of this thesis. See also, Zokaityte (2016) *Capital Markets Law Journal* 405-413.

<sup>514</sup> See para 4.2.3.3 above. Also see Stoop (2014) *THRHR* 136-144. For a similar provision in Singapore on ambiguity, see Ch 5 para 5.3.2.9.2 (s 18 of the CPFTA), and in the UK see Ch 6 para 6.3.4.3.1.1 (s 69 of the CRA).

<sup>515</sup> This aspect falls outside the scope of this thesis.

<sup>516</sup> For a discussion of the dispute settlement mechanism under the CPA and proposals for its amendment, see Mupangavanhu (2012) *PELJ* 320-341. For a discussion of s 69 of the CPA see Scott *LLD* 45-50; Naudé & Eiselen *Commentary* 69-3, 69-19; Koekemoer (2017) *JCP* 423. Also, see Van Heerden & Barnard (2011) *JICL* 131-138.

<sup>517</sup> Section 69(a).

<sup>518</sup> Section 69(b), or an ombud envisaged in section 69(c)(i).

<sup>519</sup> Section 69(c)(ii).

<sup>520</sup> Section 69(c)(iii).



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71.<sup>521</sup> Only at this stage – once all other available statutory remedies have been exhausted – may the consumer approach a court with the necessary jurisdiction.<sup>522</sup>

The Commission is established in terms of section 85 of the CPA.<sup>523</sup> Section 85(1) provides that the Commission must exercise the functions assigned to it under the CPA, mainly in section 92(1) thereof, or any other law, in accordance with the values and principles in section 195 of the Constitution.<sup>524</sup> The Commission has statutory powers only.<sup>525</sup>

The National Consumer Tribunal (Tribunal) was established in terms of section 26 of the NCA. The CPA provides that the Tribunal's responsibility regarding the realisation of consumer rights in section 4 of the CPA, amongst others, is the development of the common law to improve the realisation and enjoyment of consumer rights – in particular as regards vulnerable consumers provided for in section 3(1)(b) of the CPA.

Woker remarks that the intention of the legislature could never have been for the Commission and Tribunal to be solely responsible for the application and adjudication of consumer law under the CPA.<sup>526</sup> It appears that consumers are unaware of the complaint procedures and forums available.<sup>527</sup> Lack of capacity has also been reported at the Commission. Particularly in its early stages, the Commission did not always follow compliance requirements for the issuing of compliance notices, and it has been criticised for not enforcing the provisions of the CPA vigorously.<sup>528</sup> Several factors influence the effectiveness of these forums, for instance, the cost and the time required to lodge a complaint, how effectively the forum operates, the transparency of the operations, whether they are readily accessible and easy to use, and the kind of relief a forum could offer the consumer.<sup>529</sup>

Naudé reiterates the most important aspect of consumer redress:<sup>530</sup> 'The path of a consumer complaint should be clear and easy to understand.' In addition, the

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<sup>521</sup> Section 69(c)(iv).

<sup>522</sup> Section 69(d). See Sharrock *Business Transactions* 637; *Joroy 4440 CC v Potgieter and Another NNO* 2016 (3) SA 465 (FB) para [8].

<sup>523</sup> One of the purposes of the CPA is to establish the Commission.

<sup>524</sup> Section 195 of the Constitution deals with the basic values and principles governing public administration, inter alia, that the service must be provided fairly, equitably, and without bias.

<sup>525</sup> See ss 92-98 of the CPA.

<sup>526</sup> See Woker (2016) *SA Merc LJ* 21-48 for a discussion of dispute resolution, its challenges, and recommendations.

<sup>527</sup> Koekemoer 2017 *JCP* 419-455.

<sup>528</sup> Naudé & Barnard *Enforcement* 570.

<sup>529</sup> Koekemoer (2017) *JCP* 423-443. Also, see Koekemoer (2014) *JABR* 659-669 on a similar study in the Motor Vehicle Service Industry.

<sup>530</sup> Naudé (2010) *SALJ* 547.

complaint should be handled and finalised rapidly, efficiently, correctly, and with no serious cost implications for the consumer.<sup>531</sup>

Section 69(c)(iii) of the CPA provides that a matter can be referred to a different alternative dispute resolution agent. The result of this provision is that there will be no formal record of the decision, which could lead to a situation where there is a lack of guidance for future decisions, and no uniformity in the enforcement of the CPA.

It is clear that much work is needed to inform the consumer of the process of enforcement under the CPA, to make the enforcement process transparent to the consumer, to simplify the process, and to make the process as time and cost effective as possible.<sup>532</sup> This will ensure efficient enforcement of the CPA and ultimately contribute to consumer empowerment.

#### 4.3.7.2 Normal court with jurisdiction<sup>533</sup>

Under normal circumstances, the court appears to be the last resort for consumers as the consumer must, on an initial reading of section 69, first exhaust all other options in section 69 of the CPA,<sup>534</sup> save as provided for in section 52. As the Commission and the Tribunal are creatures of statute and do not have inherent jurisdiction on matters other than those specifically provided for in the CPA, one can argue that when a consumer bases his or her case on the common law alone, rather than as an alternative, then only a court has jurisdiction. The same argument can be used when a consumer bases his or her complaint or dispute solely on the agreement itself and not a provision of the CPA.<sup>535</sup>

In addition, courts and the Tribunal must in terms of section 4(2)(a), develop the common law to improve the realisation and enjoyment of consumer rights generally.<sup>536</sup> Courts (and other bodies) must promote the spirit and the purposes as set out in section 4(2)(b)(i) and further should advance consumers' rights in practice to ensure the realisation of these rights to redress.<sup>537</sup> The court and these bodies should further also be innovative in their orders to give effect to the aims of the CPA.<sup>538</sup> The Commission and Tribunal are not expressly authorised or empowered by the CPA to deal with common-law matters. They are creatures of statute and can

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<sup>531</sup> Also see Woker (2016) *SA Merc LJ* 21, 48.

<sup>532</sup> Scott *LLD* 51.

<sup>533</sup> For a discussion of the powers of court see Van Heerden & Barnard (2011) *JICL* 136-138. Also see, Barnard & Mišćenić (2019) *Journal for Juridical Science* 111-136.

<sup>534</sup> This was confirmed in *Joroy*.

<sup>535</sup> Naudé 2009 (*SALJ*) 526. See Naudé & Barnard *Enforcement* 575-576 on the jurisdiction of courts. Also see Mupangavanhu (2012) *PELJ* 340 on the jurisdiction of ordinary courts and s 34 of the Constitution.

<sup>536</sup> Sharrock *Business Transactions* 587.

<sup>537</sup> Section 4(2)(b)(ii); Sharrock *Business Transactions* 587.

<sup>538</sup> For more information see Naudé & De Stadler (2019) *PELJ* 1-27.

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only hear statutory matters. However if they are granted the power and authority to adjudicate on common-law matters, access to justice will improve.

I now return to the hierarchy principle in section 69 of the CPA.

Possible exceptions or arguments against the hierarchy principle in section 69 are:<sup>539</sup>

- That disputes based on section 14 agreements should, as common-law agreements, be heard by a court directly without first exhausting all other measures in section 69.
- That disputes based on breaches of contract should be heard by courts as these disputes are not based on a provision in the CPA (I support this argument in theory). The wording of section 69 unfortunately appears to contradict this approach and, to my mind, closes this so-called loophole.<sup>540</sup>
- There are arguments that all disputes based on common-law contract disputes can be heard by courts directly<sup>541</sup> as the bodies in section 69 are creatures of statute and so lack jurisdiction. In addition, section 4(2) of the CPA provides that courts and the Tribunal must develop the common law, which also counters this argument.
- Disputes based on unfairness are the only disputes that must be heard by courts, and the CPA expressly excludes them from the procedure and sequence of steps in section 69. When a dispute is based on unfairness the consumer can and must go directly to court as other bodies cannot adjudicate the dispute.<sup>542</sup> Further, in light of the presumption that the legislature does not intend inserting purposeless and invalid provisions in legislation,<sup>543</sup> it is submitted that there is no other valid interpretation of this section.<sup>544</sup>
- Another possible point of view is based on the argument that legislation respects the rights guaranteed in the Bill of Rights.<sup>545</sup> Section 34 of the Bill of Rights provides that everyone has the right to have any dispute decided before either a court, or, in the second part of the sentence, provides as an alternative that anyone can have a fair and public hearing before another independent and impartial Tribunal or forum.<sup>546</sup> The

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<sup>539</sup> See Scott *LLD* 45-51.

<sup>540</sup> See s 69. See also *Joroy*. The only way to change this is to amend the CPA, or to find it unconstitutional, which is unlikely – see *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC). Also see Du Plessis (2016) *SA Merc LJ* 156.

<sup>541</sup> Naudé (2009) *SALJ* 525-528.

<sup>542</sup> Section 52.

<sup>543</sup> Botha *Wetsuitleg* 173.

<sup>544</sup> However, s 52(1)(b) limits the powers of the court to matters where the CPA does not provide a remedy.

<sup>545</sup> Botha *Wetsuitleg* 172.

<sup>546</sup> Scott *LLD* 47-48. Scott is of the view that s 69 could be interpreted to give effect to the consumer's s 34 constitutional right.

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assumption that the legislature respects the rights in the Bill of Rights could therefore preclude the interpretation in *Joroy*,<sup>547</sup> which deprives the party of the right to a court hearing for an extended period in that he or she must first approach other ineffective bodies which could waste both time and money.<sup>548</sup> A party wishing to contest the judgment in *Joroy* could base his or her case on section 36 of the Constitution, or perhaps even on ubuntu. It would be interesting to see how a court would decide such an argument.

The Constitutional Court's approach to jurisdiction is important. In *Chirwa v Transnet Ltd and Others*<sup>549</sup> the Constitutional Court decided that where a specialised framework for dispute resolution exists, parties should use this framework, and that the jurisdiction of the High Court is excluded.<sup>550</sup> In the *Chirwa* case however, a statutory provision provided that the Labour Court had exclusive jurisdiction over the specific matter.<sup>551</sup> The scenario in section 69 of the CPA differs from this, as the jurisdiction of the court is not totally excluded by section 69. However, an argument could be made that the jurisdiction of the court is suspended, and therefore initially excluded, until such time as the complainant has exhausted all the other options in section 69.

These arguments are relevant as the procedure for approaching an ombud, the Commission, and the Tribunal have unfortunately proven very inefficient and time-consuming.<sup>552</sup> This deprives consumers and suppliers of effective, cost-effective, and timely redress – an aim of the CPA. On the other hand, although access to court would be ideal, it also involves a financial burden for the consumer, as well as not always being time-efficient. The solution is clearly to ensure that the bodies listed in section 69 become more efficient.

As the statutory body or court must exercise its discretion for the benefit of the consumer in cases of doubt or ambiguity,<sup>553</sup> another potential problem posed by the interpretation of the provisions of the CPA is the possibility of widely differing judgments based on the same set of facts. This is because the discretion is based not on the law or the analysis of the facts and the law, but rather on the benefit of the individual consumer. The *stare decisis*<sup>554</sup> rule could be detrimentally affected by this.

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<sup>547</sup> See the discussion in para 4.2.4.

<sup>548</sup> This argument was not used in the pleadings.

<sup>549</sup> 2008 (4) SA 367 (CC) (hereafter *Chirwa*).

<sup>550</sup> *Chirwa* paras [59] [67]-[68].

<sup>551</sup> See Scott *LLD* 49-50.

<sup>552</sup> See para 4.3.7.1 above.

<sup>553</sup> As intended in s 4(3) of the CPA.

<sup>554</sup> *Stare decisis* is the rule to abide by decided cases, see Hiemstra & Gonin *Drietalige Regswoordeboek* 292.

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The procedure and hierarchy provided in section 69 should be reviewed by the legislature<sup>555</sup> and clarified to ensure much-needed accessible, effective, time-efficient, and affordable redress for consumers.<sup>556</sup>

I now briefly consider case law, and highlight how courts should interpret and apply the CPA and transformative constitutionalism to effect the purposes and aims of the CPA.

#### 4.4 Case law and transformative constitutionalism

##### 4.4.1 Introduction

To date no judgment based on and dealing specifically with section 14 of the CPA has been reported. Du Plessis argues that the paucity of consumer-law judgments in general is because consumers first have to explore and exhaust other forms of adjudication before approaching a court.<sup>557</sup> This aspect of the CPA is criticised by Du Plessis and Naudé both of whom argue, correctly in my view, that consumers should be entitled to approach court directly, especially where damages are involved.<sup>558</sup> There also appears to be problems related to the administration and efficiency of the Commission and the Tribunal.<sup>559</sup> This notwithstanding, a limited number of complaints have been heard by the Tribunal.<sup>560</sup>

The courts' important task of developing the law when deciding disputes before them is, to an extent, sidelined by the CPA requiring consumers first to exhaust, in the set order, the steps and formalities in section 69 before approaching a court.<sup>561</sup> This restricts the development of consumer law by largely excluding the courts.<sup>562</sup> The only clear exception in terms of which a party may approach court directly is when, as party to a fixed-term agreement, he or she bases the claim on unfairness in section 52.<sup>563</sup>

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<sup>555</sup> Naudé (2010) *SALJ* 547; Scott *LLD* 205-206.

<sup>556</sup> Scott *LLD* 195-196.

<sup>557</sup> Section 69 CPA; Du Plessis (2016) *SA Merc LJ* 147.

<sup>558</sup> Du Plessis (2016) *SA Merc LJ* 148; Naudé (2010) *SALJ* 527.

<sup>559</sup> See the discussion in para 4.3.7.1.

<sup>560</sup> For example, NCT/14719/2012/101(P) CPA, in which the Tribunal decided that s 14(2)(a) and (b) do not apply as it (the contract) expired before the second anniversary of the Act. The most relevant complaint was heard by adjudicator Melville, see para 4.4.2 below. In another complaint, Complaint 201602-0005932 7 March 2016, also before adjudicator Melville, the facts were similar. This time the membership was for 1 year and the consumer gave notice to cancel after 2 months. The gym demanded an 80% cancellation fee. In deciding if the 80% was a reasonable cancellation fee, the adjudicator decided that R699 constituted a reasonable cancellation fee, which amounted to approximately 30% of the outstanding fees.

<sup>561</sup> For a discussion of this see Scott *LLD* 32-115; Naudé (2010) *SALJ* 515-547; Du Plessis (2016) *SA Merc LJ* 147-157.

<sup>562</sup> Scott *LLD* 45-51.

<sup>563</sup> See para 4.3.2.6. Also bear in mind the limitation in s 52(1)(b).

#### 4.4.2 Ombud decision

Regulation 5(2) regulates the calculation of the reasonable credit, or charge a supplier may give or impose on a consumer who cancels an agreement.<sup>564</sup> Regulation 5(3) provides that a supplier may not charge an amount that has the effect of negating the consumer's right to cancel the fixed-term contract – eg, charge an amount equal to the payments due for the remainder of the fixed-term contract period – which would clearly disadvantage the consumer.<sup>565</sup>

The reasonable credit or charge contemplated in regulation 5(3) as well as the provisions of section 14(4) were adjudicated in Complaint 201506-000377<sup>566</sup> by the Consumer Goods and Services Ombud.<sup>567</sup> The complainant entered into a gym agreement for a three-year period. The complainant stopped his monthly payments and sought to cancel the agreement before the expiry of the three-year period. The consumer was informed that his contract superseded the CPA, and that he was liable for three years of monthly subscription fees – ie, R4 329, which included arrear monthly subscription fees, annual levies for three years, and 50 per cent of the remaining monthly payments for the three years. The adjudicator decided on three issues:

- Was the supplier entitled to a three-year contract as he did not show a demonstrable financial benefit to the consumer? The adjudicator decided in the negative, and in addition, pointed out that the five-day cooling off period was not sufficiently conspicuous in the contract and the supplier should have brought this to the attention of the consumer.<sup>568</sup>
- The supplier did not expressly provide in which way the contract had to be cancelled, and insisted on cancellation in writing, which led to a longer time to cancel, and in turn to more months' unpaid fees.<sup>569</sup>
- Whether the cancellation fee charged was reasonable. The ombud decided that section 14 did not allow for the future loss of profit – ie, payment of future monthly fees. The ombud fixed the amount owed by the complainant at R1 100 being the arrear membership fees, the annual

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<sup>564</sup> This aspect of reg 5 will be discussed here for purposes of fluency of the discussion. The remainder of reg 5 is discussed in para 4.2.3.7.10 above.

<sup>565</sup> Also see the discussion of penalty clauses in Ch 3 para 3.2.11 and the judgment discussed in Ch 6 para 6.6.4.

<sup>566</sup> Dated 25 January 2016 before Melville (Gym-complaint example). Also see Complaint No 201602-0005932 7 March 2016 again before Melville.

<sup>567</sup> The Consumer Goods and Services Ombud (CGSO) is a scheme of alternative dispute resolution for the Consumer Goods and Services Industry as described in s 82(6) of the CPA.

<sup>568</sup> Section 16 regulates cooling-off periods. Section 16(3) provides for the 5-day cooling-off period, and provides that when a contract is concluded as a result of direct marketing, the consumer is entitled to cancel the agreement without penalty, within 5 days after conclusion of the agreement or delivery of the goods. The cooling-off period provides the consumer with an additional right, and he or she retains all his or her other rights in terms of the CPA and the common law. See s 16(2).

<sup>569</sup> Section 14(2)(b)(i)(bb) provides that the 20 days' notice in terms of s 14 should be given in writing or other recorded form. See the discussion in para 4.2.3.7.7 above.

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levy, and an estimate for costs involved in the cancellation of the agreement.

The guidelines used for calculating the cancellation penalty are:<sup>570</sup>

- 'the value of the transaction up to cancellation;
- the value of the goods which will remain in the possession of the consumer after cancellation;
- the value of the goods that are returned to the supplier;
- the duration of the consumer agreement as initially agreed.'<sup>571</sup>

Where a consumer does not retain goods, services, or discounts, for instance on termination of a lease agreement, there will be no penalty or fee due to the supplier in respect of these.<sup>572</sup>

I will now proceed to study important case law to analyse and criticise how agreements in terms of section 14, and the CPA could be interpreted and applied to effect the envisaged aims and purposes of the CPA and the Consitution.

#### 4.4.3 *Transformative constitutionalism*

The interpretation of statutes, the common law, and agreements form an important part of the application and development of law and legal culture. Courts play a vital role in this process in that it is they that are called upon to develop the law by the way in which they promote the constitutional goals through their application of the precepts of interpretation, these statutes, the common law, and agreements.

At the same time, courts, commissions, and Tribunals must give effect to the aims, objects, and purposes of the specific legislation they are dealing with, whilst being fair and just and taking common-law principles and public policy into account. This is a delicate balancing act, and the philosophy and school of thought behind the approach to the interpretation of legislation is paramount in the development of legal culture.

Another interesting aspect that comes into play when interpreting agreements is the effect of legislation – eg, consumer protection legislation – on the development, policies, and principles of the common-law of contract. This aspect has the potential to disrupt the logical and ordered development of the common-law of contract principles as it affects the way courts interpret agreements to fit the purpose or purposes of the legislation involved.<sup>573</sup>

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<sup>570</sup> See Gym-complaint example Annexure A 11 and 13 for more details and a discussion. Although reg 5(2) lists other guidelines as well—the adjudicator specifically ruled that these four factors should be taken into consideration when the supplier calculates the penalty.

<sup>571</sup> See reg 5(2) of the CPA Regulations for all the guidelines.

<sup>572</sup> Hutchison et al *Law of Contract* 381.

<sup>573</sup> Bant (2017) *MLR* 895; Van Heerden & Barnard (2019) *THRHR* 449-450.

Transformative constitutionalism is important in the interpretation of fixed-term contracts as the court must interpret the CPA purposively. In addition, when the common-law of contract is involved, its specific retention in section 2(10) of the CPA means that the common law must be developed and interpreted by applying transformative constitutionalism.

#### *4.4.4 The interpretation of legislation to effect transformative constitutionalism*

Transformative constitutionalism involves that when courts decide a dispute, the Constitution must be interpreted liberally to promote political and socio-economic change and reform.<sup>574</sup> Van der Walt regards human dignity, equality, and freedom in section 7(1) of the Constitution as the framework for constitutional transformation.<sup>575</sup> It is a given that the purpose of law is not solely to ensure and effect justice; it is also a tool for political and socio-economic change and transformation in a constitutional democracy based on collectivism.<sup>576</sup> In his article on the influence of legal culture on transformative constitutionalism, Klare highlights the importance of the judiciary in 'a site of law-making activity'.<sup>577</sup> This involves a wide approach to legal interpretation, as one knows that the common law, case law, and statutes are the main sources of the law. Therefore, one sometimes loses perspective of the important role and function that the interpretation of the sources – common law, case law, and legislation – plays in the development of the law and in the way transformation and justice are brought about. To implement this, Klare proposes judges should find a balance between judicial method and how the law is interpreted in terms of the sphere and objectives of the Constitution.<sup>578</sup> Hale argues that the grounds for economic policies should be less conservative than the principles of freedom of contract and private property, as these principles can both cause and perpetuate existing imbalances and inequalities.<sup>579</sup>

There is an inherent risk in interpreting the law to effect political change as the individual political views and inclinations of judges and adjudicators play a major role. Perhaps that is why courts and judges tend to interpret somewhat objectively and conservatively in order not to give too much weight to the personal political

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<sup>574</sup> For general background on this topic see Moseneke (2009) *Stell LR* 3013; Tladi (2002) *De Jure* 306-317; Langa (2006) *Stell LR* 351-360; Van der Walt (2005) *TSAR* 655-689; Van der Walt (2006) *TSAR* 1-31. Klare (1998) *SAJHR* 150-151, stresses that this interpretation should try to give effect to the hopes and ideals of the Constitution. See also Bhana *PhD* 36-38, 241-242. The CPA is legislation that aims to effect political and socio-economic change – see *Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico and Others* (4260/2015) [2016] ZANCHC 1 (1 April 2016) where the court referred to the CPA as 'a social justice piece of legislation' that has as purpose, inter alia, to protect consumers by ensuring that they have clear and unobstructed access to redress.

<sup>575</sup> Van der Walt (2006) *Fundamina* 1, 4.

<sup>576</sup> Bauling & Nagtegaal (2015) *De Jure* 149, 151.

<sup>577</sup> Klare (1998) *SAJHR* 146-147.

<sup>578</sup> Klare (1998) *SAJHR* 188.

<sup>579</sup> Hale (1943) *Colum L Rev* 627-629.



aspect of interpretation, and to ensure objectivity and predictability. A further risk is that when the ruling political party changes, all legislation and judgments must also shift gear to reflect the latest government's policies which, of course, threatens legal certainty.<sup>580</sup> However, when the Constitution is used as a compass and the primary source for transformation, this risk diminishes somewhat in the face of the gravitas of the Constitution.

It is common cause that the judiciary must apply the Constitution to all judgments. However, Davis observes that court judgments in key cases unfortunately indicate the opposite approach.<sup>581</sup> He criticises the general view and definition of freedom of contract, and notes that these definitions do not, as a rule, include sufficient reference to constitutional aspects, although there usually is some reference to public policy and good faith.<sup>582</sup> He remarks that courts normally provide a general constitutional background in their decisions on the common-law of contract, and then proceed to base their judgments on 'real' contract law. He argues these judgments do not truly reflect the law as it should be interpreted in a constitutional democracy. In many instances courts pay lip service to the Constitution, but lack the true courage and conviction to implement transformative constitutionalism in their judgments.<sup>583</sup> As a purposive approach and constitutional values will play an important role in the interpretation and application of disputes under the CPA and section 14 more specifically, a few judgments will be analysed to see what guidance can be found.

#### 4.4.5 Case Law

##### 4.4.5.1 *Afrox Health Care Bpk v Strydom*<sup>584</sup>

In his critique of case law in which there has been a failure to develop constitutional principles, Davis first refers to *Afrox* which well illustrates his argument. Strydom, a patient at a private hospital, was required to sign the hospital's standard admission form in which he absolved the hospital of liability for damages caused by injuries or death resulting from default by hospital staff, unless the default was wilful. After his operation, Strydom suffered complications which appeared to arise from the negligent conduct of nursing staff. He consequently sued the hospital which, of course, relied on the indemnity clause in the standard admission form. Strydom claimed that the indemnity clause was against public policy or, in the alternative,

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<sup>580</sup> For example, France and Italy. See <https://www.euronews.com/2016/12/13/why-do-italian-governments-change-so-often> (date of use: 5 February 2020).

<sup>581</sup> Davis (2011) *Stell LR* 845-863.

<sup>582</sup> Davis (2011) *Stell LR* 847. Davis also observes there are exceptions and refers to Bhana 2008 *SAJHR* 300, 303.

<sup>583</sup> Davis (2011) *Stell LR* 847.

<sup>584</sup> 2002 (6) SA 21 (SCA) (hereafter *Afrox*).

that it was not in line with good faith, equity, and fairness set out in section 27(1)(a) of the Constitution.<sup>585</sup>

The court paid attention to the *pacta servanda sunt* maxim, made mention of the fact that these types of clauses were in line with the *contra proferentem* maxim, to be interpreted against Afrox, and proceeded to regard a strict version of the freedom of contract principle as an essential constitutional value. This is, of course, the classic example of unequal bargaining positions as theorised by Kessler.<sup>586</sup> Brand JA, curiously, found that the plaintiff was not in a weaker bargaining position than the hospital.<sup>587</sup> Davis appropriately criticises this view as he argues that a patient who urgently needs an operation from a hospital, can surely not be in an equal bargaining position.<sup>588</sup> The court also dismissed 'abstract notions' such as good faith, reasonableness and fairness as a foundation to set aside or restrict contractual provisions.<sup>589</sup> The critical error on the side of the court here was not to weigh the importance of the constitutional right to healthcare against the principles of contract law, especially when interpreted in the context of a contract entered into in a situation of obvious unequal bargaining position.<sup>590</sup> It must be noted that the outcome of this case probably would have been different had the CPA been applicable at the time.

#### 4.4.5.2 *Barkhuizen v Napier*<sup>591</sup>

The applicant Barkhuizen was insured by a company represented by the respondent. The applicant suffered a loss because of a motor vehicle accident and notified the respondent. The claim was repudiated. Two years later the applicant instituted action against the respondent, the respondent raised a special plea as the applicant was obliged to institute action in terms of the policy within 90 days of repudiation.<sup>592</sup>

The essence of the matter before the Constitutional Court was whether a time limitation clause in a contract was against public policy,<sup>593</sup> as the limitation restricts a party's right to approach the court. A time limitation can be unreasonable and contrary to public policy, but public policy relies on ubuntu, which means that a person should have had sufficient opportunity to approach court.<sup>594</sup> When a person

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<sup>585</sup> This section provides that everyone has the right to access to health care.

<sup>586</sup> See the discussion of the unequal bargaining position in Ch 2 para 2.5.

<sup>587</sup> *Afrox* para [12].

<sup>588</sup> Davis (2011) *Stell LR* 851.

<sup>589</sup> *Afrox* para [32].

<sup>590</sup> Davis (2011) *Stell LR* 852.

<sup>591</sup> 2007 (5) SA 323 CC (hereafter *Barkhuizen*).

<sup>592</sup> The case was first heard by the provincial court, and then the appeal court. See the note by Bhana on the appeal judgment, Bhana (2007) *SALJ* 269-280, and Woolman's response to Bhana in (2008) *SALJ* 10-24.

<sup>593</sup> The court held that the effect of a time limitation is the same, whether it is in a contract or in legislation. See *Barkhuizen* para [46].

<sup>594</sup> *Barkhuizen* paras [51]–[52].

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has a reasonable, adequate and fair opportunity to approach the court for legal redress such a limitation is not against public policy. The court confirmed that the Constitution is the source or foundation of public policy.<sup>595</sup>

A decision based on fairness hinges on two factors; the first is whether the clause itself is unreasonable, secondly, the court should decide whether it has to be enforced, taking into account the factors that caused non-compliance to the time limitation in the relevant clause.<sup>596</sup> To decide if a clause is unreasonable, public policy on the one hand, and the right to seek legal redress on the other, must be considered and balanced. The court held that the careful balance between the unreasonableness of the clause in question, and the right to seek legal redress, reflects constitutional values.<sup>597</sup> The second factor – why compliance could not take place within the time limitation – will focus on the circumstances preventing such compliance, implying there must have been good and valid reasons for non-compliance.<sup>598</sup>

The court will also evaluate the circumstances surrounding the conclusion of the agreement, such as a lack of bargaining power, a lack of understanding regarding the contents of the agreement, and if the contract was entered into freely, to establish whether the time limitation is contrary to public policy.<sup>599</sup>

After consideration of these factors, the court decided the applicant had sufficient time to issue summons after repudiation of his claim by the insurer in that he had all the information he needed to issue summons. The court found that 90 days was sufficient in the circumstances, and that the enforcement of the time limitation clause was reasonable.<sup>600</sup>

#### 4.4.5.3 *Maphango v Aengus Lifestyle Properties (Pty) Ltd*<sup>601</sup>

The essence of the dispute in *Maphango v Aengus Lifestyle Properties (Pty) Ltd* was whether a lessor could terminate a lease and evict lessees with the sole purpose of obtaining higher rental, whether this termination constituted an unfair practice, and if the Rental Housing Act 50 of 1999 should be taken into account when determining the issue. The court also had to establish the extent of protection the Constitution provides to either or both parties. This case is interesting for purposes of this thesis as it affected poor and destitute individuals and investigated the extent to which the Constitution could, or should, be interpreted and applied to transform in order to protect such individuals.

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<sup>595</sup> *Barkhuizen* paras [7], [28], and [104]. Also, see Sutherland (2008) *Stell LR* 406-408.

<sup>596</sup> *Barkhuizen* para [56].

<sup>597</sup> *Barkhuizen* para [57].

<sup>598</sup> *Barkhuizen* para [58].

<sup>599</sup> *Barkhuizen* paras [63]-[67].

<sup>600</sup> *Barkhuizen* para [67]; Sutherland 2008 *Stell LR* 412-413.

<sup>601</sup> 2012 (3) SA 531 CC (hereafter *Maphango*).

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The lessor bought the property in which the applicant occupied a flat, upgraded the building, and then sought to increase the rent. The lessor sent cancellation notices to lessees and at the same time offered to enter into new agreements with exactly the same stipulations, save that the lessor was asking significantly higher rental per month.<sup>602</sup> When the lessees rejected these new agreements the lessor approached the court for their eviction. Both the South Gauteng High Court and the Supreme Court of Appeal found in favour of the lessor.<sup>603</sup>

The majority ruling in the Constitutional Court found that the Rental Housing Act applied. The court further found that legislation had to be interpreted not only to apply to contractual provisions, but to extend beyond that and to subject lease agreements – in effect common-law agreements – and the exercise of the rights in terms of these agreements, to allow courts to analyse these contracts to establish if there was unfairness when the parties' respective rights and interests were considered.<sup>604</sup> Cameron J held that the common law should be developed to limit the lessor's contractual right to cancel the agreement.<sup>605</sup> He also concluded that the Constitution allows legislation to be interpreted considerably more widely, especially as the Rental Housing Act was post-Constitution legislation.<sup>606</sup>

This interpretation is wider in two ways. First, it aims not to impede or impair access to housing (public bodies and private parties),<sup>607</sup> and second, when legislation affects the private parties' obligation to provide housing, it will impact negatively on the lessor's right to adequate or reasonable return on investment.<sup>608</sup>

Davis calls upon the courts to broaden the scope of the Constitution and to interpret and develop legislation and common law to bring about change. However, if they are denied a decent return on their investment, judgments such as *Maphango* could in practice discourage private property developers from purchasing, improving, and restoring derelict properties.<sup>609</sup> This would achieve exactly the opposite result envisaged by Hale and Davis and leave the poor and destitute in worse living conditions, as the state lacks both the resources and the capacity to keep up with the demand for suitable accommodation.

The relevance of the decision for this thesis is that the CPA also provides for the benefit of consumers to enjoy priority<sup>610</sup> and stresses the unfairness and unconscionability<sup>611</sup> of certain contracts. It contains a specific subsection dealing

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<sup>602</sup> The lease agreements made provision for either party to terminate the agreement by giving written notice.

<sup>603</sup> *Maphango* paras [19] and [21].

<sup>604</sup> *Maphango* para [53].

<sup>605</sup> *Maphango* para [55].

<sup>606</sup> *Maphango* para [57].

<sup>607</sup> *Maphango* paras [34]–[36].

<sup>608</sup> *Maphango* para [34].

<sup>609</sup> Also, see Stoop (2013) *Int J Private Law* 336-338.

<sup>610</sup> For example, in s 2(9), s 3, ss 4(3) and 4(4) of the CPA.

<sup>611</sup> Sections 40-52 of the CPA.

with vulnerable consumers.<sup>612</sup> Of course, a similar situation could develop in consumer-protection law, and the Constitutional Court's judgment in *Maphango* would be binding in similar circumstances. This would dissuade suppliers from dealing with consumers if there was no, or not sufficient, return on their investment, and this would disadvantage consumers in the long term.

Courts must be careful when walking the tightrope of transformative constitutionalism which might well prove to be a double-edged sword which harms the economy and prejudices the very people it aims to protect.

#### 4.4.5.4 *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd*<sup>613</sup>

In a case based on a material breach of the payment clause on the due date in a contract of lease, *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* involved an appeal against an order of the Gauteng Local Division declining to evict the respondent from the leased premises. The High Court had ameliorated the effects of the *pacta servanda sunt* maxim by applying the principles of ubuntu, fairness, and public policy.<sup>614</sup> The respondent's failure to make timely payment was due solely to the failure of the respondent's bank to effect payment on the due date and could not be ascribed to its conduct or omission. The respondent had based its case on the principle that parties who enter into an agreement do so in good faith, and that good faith lends flexibility to circumstances where a party cannot perform due to events it cannot control. Furthermore, the respondent alleged that the implementation of the cancellation clause was decidedly unreasonable, unfair, and against public policy. It further averred that the clause itself was not reasonable, as it demanded compliance without regard to the reasons for non-compliance. The respondent based this contention on the fact that the good faith of contracting parties, ubuntu, reasonableness, and simple justice were the foundations of public policy, and, that the contract should be construed in the spirit and context of the Bill of Rights.

The respondent based this argument on the *Barkhuizen* judgment.<sup>615</sup> The respondent also relied on the judgment by Jacob J in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*.<sup>616</sup> The respondent's final contention was that the cancellation would affect the respondent, its employees, contractors, and

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<sup>612</sup> Section 3(1)(b).

<sup>613</sup> 2018 (2) SA 314 (SCA) (*Mohamed's Leisure*).

<sup>614</sup> *Mohamed's Leisure* [1].

<sup>615</sup> *Barkhuizen* para [58] which found that a court could look at the circumstances and reasons for non-performance to establish if a clause in an agreement was, both objectively and subjectively, sufficiently reasonable to be enforceable.

<sup>616</sup> 2012 (1) SA 256 (CC) (hereafter *Everfresh*). In the judgment, Moseneke DCJ said that contract law should take cognisance of constitutional values, public policy, good faith, and ubuntu – it should further not be too restrictive, and should take into account the approach of the majority of the population and not be confined to classic and colonial legal tradition para [71].

secondary staff severely, and when evaluated in this light, *pacta servanda sunt* should be relaxed.

The court therefore had to decide, judging objectively, whether canceling the agreement in terms of the cancellation clause would be against public policy on grounds of unreasonableness and unfairness – in short, should the maxim *pacta servanda sunt* be preferred over constitutional values and public policy. The court relied on *Sasfin v Beukes*<sup>617</sup> and emphasised the sanctity of contracts as an integral part of contractual freedom.<sup>618</sup> It then considered the clause itself, which it found to be objectively reasonable. It decided that the contract had been entered into freely, and that both parties had enjoyed equal bargaining power. The respondent had been aware of the effect of the clause, the failure was caused by its own bank, and, in addition, the appellant had waited an additional twelve days before canceling the agreement. The appeal was successful. The court stated that had it found that *pacta servanda sunt* should be ameliorated by principles of ubuntu and public policy, it would have meant that the court stepped in on behalf of the parties, entered into an agreement, and invalidated a normal, standard and objectively reasonable clause contained in lease agreements.<sup>619</sup>

Although one generally has sympathy for the respondent and all parties affected, the judgment is based on sound and objective legal argument and reasoning. Neither the contract, nor the cancellation clause was objectively unreasonable, against public policy, or against constitutional values. Furthermore, the respondent was an experienced and well-known company in the hotel industry which was aware that a failure to pay could have dire consequences. Finally, the failure to make timely payment was caused by the respondent's agent.<sup>620</sup>

Courts should exercise caution when developing contract law to infuse constitutional values as the decision to assist a litigant should be used circumspectly,<sup>621</sup> and only when it is quite clear that the clause or agreement in question is objectively unreasonable and goes against the grain and general gist of the Constitution, ubuntu, good faith, and public policy. The following passage from *Sasfin (Pty) Ltd v Beukes*<sup>622</sup> aptly explains how a court should judge public policy:

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<sup>617</sup> 1989 (1) SA 1 (A) where the court decided that its power to declare contracts contrary to public policy should be limited to ensure legal certainty, and that the personal sense of fairness should not interfere lightly with contractual obligations.

<sup>618</sup> Para [23]. The court also referred to *Wells v South African Alumenite Company* 1927 AD 69. See further Bhana *PhD* on freedom of contract.

<sup>619</sup> *Mohamed's Leisure* para [32]. In *Beadica* the Constitutional Court reaffirmed the important role that the *pacta servanda sunt* principle plays in contracts, and as a result thereof, also in our economy and the country's economic development. The court however, put the importance of the principle in perspective and explained that the rule did not have preference over constitutional rights and values, see *Beadica* [83-87].

<sup>620</sup> As an aside, one could also mention that the parties were in equal bargaining positions at the time they entered into the agreement.

<sup>621</sup> The Constitutional Court confirmed this approach in *Beadica* [71-78].

<sup>622</sup> 1989 (1) SA 1(A) (hereafter *Sasfin*).

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'The power to declare contracts contrary to public policy should, however be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness.'<sup>623</sup>

### 4.4.6 Concluding remarks: The interpretation of the CPA and transformative constitutionalism

When interpreting a statute or an agreement, one should not only consider the literal meaning of the words, even if they are clear.<sup>624</sup> The purpose of the statute, its objectives, and the Constitution should also be examined.<sup>625</sup>

A judgment following the line of thought and argument as *Mohamed's Leisure* will, in the long-term, most benefit the economy, lessees, and consumers. The judgment balances the common-law principles, public policy, and constitutional aspirations, while still providing legal certainty. In so doing it can be seen to encourage investment by private property developers or suppliers for the long-term benefit of consumers.

It remains to be seen how courts will interpret difficult cases that involve balancing constitutional rights, the purpose and aims of the CPA, fixed-term agreements under section 14 of the CPA, the application of section 2(10), and the long-term benefit of consumers – especially those mentioned in section 3 of the CPA.

I have briefly discussed the history of consumer legislation in South Africa, the importance of the Constitution, and various policy documents addressing the CPA. I have also analysed section 14 of the CPA and the relevant sections that affect fixed-term contracts. Thereafter, I dealt with the paucity of case law and the interpretation of legislation by implementing transformative constitutionalism to indicate a possible way section 14 could be interpreted and applied.

### 4.5 Conclusion: Chapter 4

The supplier can draft the section 14 standard-form agreement on his own terms. He is well-protected by section 14 and is entitled to payments to date of cancellation. In addition, he can, in his discretion, impose a penalty by using the guidelines provided in section 14(4) and regulation 5, which are neither overly prescriptive nor models of clarity.

The consumer, who is in an unequal bargaining position, is compelled to accept the terms of this agreement. This is why section 14 was drafted, specifically to protect the consumer. But, unfortunately, section 14 of the CPA does not expressly provide

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<sup>623</sup> *Sasfin* per Smalberger JA 9.

<sup>624</sup> Delpont (2014) *Obiter* 66-69.

<sup>625</sup> See para 4.2.3.3; Delpont (2014) *Obiter* 74; Botha *Wetsuitleg* 105-111.

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the consumer with remedies by which to enforce his or her rights. The section also lacks sufficient protective measures for the consumer in the section – save for the right to cancel at any time by giving 20 business days' notice. Because of his or her unequal bargaining position, the consumer will not be able to include the common-law protection measures available to purchasers and lessees to the fixed-term agreement.<sup>626</sup>

When a dispute between the supplier and consumer arises, the matter will have to follow the hierarchy set out in section 69. Only after having exhausted these measures – in all likelihood a drawn-out process taking an inordinate time – will the consumer be in a position to access the courts to attempt to enforce his or her common-law rights. It is moot whether a court is able to 'insert' all the common-law protective measures available to the consumer into the standard-form agreement – ie, to disregard the contents of the contract so as to find in favour of the consumer.

The disadvantages of section 14, and other relevant and secondary provisions of the CPA are:

- The limitation of duration of fixed-term contracts is superfluous and serves no purpose in protecting consumers who may terminate the agreement at any time under section 14(2)(b)(i)(bb).<sup>627</sup>
- Consumers are not protected at all in the event of default by the supplier as they cannot summarily terminate the agreement in these circumstances.<sup>628</sup>
- The fact that a consumer is required to give notice in the event of non-performance or default by the supplier as provided in section 14(2)(b)(i)(bb), means that the consumer remains liable for payments until cancellation, even if the supplier has not performed. He or she is also liable to a penalty, even though the contract has to be cancelled through no fault of his or her own.<sup>629</sup>
- The interpretation and application of section 2(10) needs urgent clarification if it is to be of assistance to the consumer.<sup>630</sup> In addition, the position regarding the common-law rights of suppliers must also be established with certainty.
- The effect on the *stare decisis* rule of the implementation by courts or bodies of the section 2(10) rule, can be unpredictable as courts will interpret and apply the section differently.<sup>631</sup>

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<sup>626</sup> Although he or she retains his or her common-law rights in terms of s 2(10), he or she may not be aware of this fact, or exactly what these comprise.

<sup>627</sup> See para 4.2.3.7.7 above.

<sup>628</sup> See para 4.2.3.7.7 above.

<sup>629</sup> Paras 4.2.3.7.7, 4.2.3.7.9 and 4.2.3.7.10 above.

<sup>630</sup> Para 4.2.4 above.

<sup>631</sup> Para 4.2.4 above.



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- The problems relating to the hierarchy of bodies and courts need to be addressed and the position clarified to be in line with Constitutional values, and to ensure that it is transparent, affordable, and accessible.<sup>632</sup>
- The fact that in many cases there are no formal records of the decisions of, for example, alternative dispute resolution hearings, could lead to a lack of uniformity in the application of the CPA, and a lack of precedent-setting for future decisions.<sup>633</sup>
- The fact that only disputes based on unfairness can be referred to court could work to the disadvantage of consumers not able to afford litigation.<sup>634</sup>
- It is a disadvantage that section 14(4) contains no clear provisions on how the supplier must prove discounts or advantages accorded the consumer on contracts in excess of 24 months.<sup>635</sup>
- The fact that statutory bodies do not assist consumers efficiently.<sup>636</sup>
- The general trend that the consumer is merely afforded protection but not effectively empowered which results from the CPA being more reactive than proactive.<sup>637</sup>
- The fact that most courts do not implement effective constitutional transformation in suitable circumstances.<sup>638</sup>
- The fact that the CPA is not written in plain language which the average consumer can understand and interpret with ease.<sup>639</sup>
- In general, the fact that there is a lack of education and efficient educational programs to advance financial literacy and ensure that consumers achieve an acceptable level of financial literacy is lamentable.<sup>640</sup>
- The vagueness of the calculation of the penalty the supplier can claim from the consumer in terms of section 14(3) is a disadvantage. The legislature could rather include a formula or sliding scale in section 14 or the Regulations by which this amount could be calculated. Alternatively, the amount, or the formula to calculate the amount payable in terms of section 14(3), should be provided in writing to the consumer when the contract is concluded.<sup>641</sup>

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<sup>632</sup> Section 69 and see para 4.3.7 above.

<sup>633</sup> Section 69(c)(iii) and see para 4.3.7.1 above.

<sup>634</sup> Paras 4.3.2.6 and 4.3.7 above.

<sup>635</sup> Para 4.2.3.7.9 above.

<sup>636</sup> Para 4.3.7 above.

<sup>637</sup> Para 4.3.5 above.

<sup>638</sup> Para 4.4 above.

<sup>639</sup> Para 4.3.2.5.

<sup>640</sup> Paras 4.3.2.2 and 4.3.5.

<sup>641</sup> Para 4.2.3.7.10, and subject to the provisions of the Conventional Penalties Act.

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- The negative and unpredictable effect of random decisions by bodies or courts when implementing the advantage to consumers as intended in sections 2(9) and 4(3) on the *stare decisis* rule.<sup>642</sup>
- The fact that the parol evidence rule is not expressly excluded in consumer contracts and for purposes of the CPA, is a further disadvantage. Given their inferior bargaining power, it would have benefited consumers had the parol evidence rule been expressly excluded. This would enable them to provide all relevant evidence regarding the facts and circumstances in a dispute.<sup>643</sup>
- The potential disadvantage the limitation of the duration of fixed-term contracts in section 14 has on both lessees and lessors.<sup>644</sup>
- It is also regrettable that shortcomings in the CPA are not addressed timeously by the legislature. Many of the disadvantages have been pointed out by writers but no action has been taken to remedy the position.<sup>645</sup>
- The fact that fairness can only be considered by courts as a remedy of last resort due to the limitations in section 52(1)(b), is a lost opportunity.<sup>646</sup>
- From the perspective of suppliers, the CPA negatively affects their common-law rights to freedom of contract, *pacta servanda sunt*, the application of the parol evidence rule in certain circumstances, *caveat subscriptor*, voetstoets, and the passing of risk.<sup>647</sup>
- Small business enterprises should ideally also be protected by the provisions of section 14 of the CPA – particularly in light of the wide meaning attributed to the term in the CPA.
- The CPA should provide that adjudicating bodies and courts can take notice of fairness *mero motu* at any stage in consumer proceedings, as that would improve access to justice.<sup>648</sup>

On the other hand, there are clear advantages to section 14 (and other relevant provisions) of the CPA:

- The CPA aims to comply with international standards of consumer protection.<sup>649</sup>
- The limitation of the duration of contracts in certain types of agreement is definitely to the advantage of consumers – notably cell phone agreements and gym contracts – as this ensures that consumers are not bound for unreasonably long periods. It should however be remembered that the

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<sup>642</sup> Paras 4.2.3.3 and 4.3.7.2.

<sup>643</sup> Para 4.3.2.7.

<sup>644</sup> Para 4.2.3.8.

<sup>645</sup> See, eg, Stoop (2014) *THRHR* 139, 144; Delport (2014) *Obiter* 60-80.

<sup>646</sup> Para 4.3.2.6.

<sup>647</sup> Paras 4.2.3.7.10 and 4.2.3.7.11.

<sup>648</sup> See, eg, the discussion in Ch 6 para 6.3.4.3.1.1 on the position in the UK.

<sup>649</sup> Para 4.2.2.3.

South Africa: The position of consumers under fixed-term agreements regulated by the Consumer Protection Act 68 of 2008

consumer remains free to cancel the contract at any time in terms of section 14(2)(b)(i)(bb).<sup>650</sup>

- The position of the consumer has, in general terms, improved after implementation of the CPA, especially with the effect of the CPA on common-law principles such as freedom to contract, *pacta servanda sunt*, parol evidence, voetstoots, passing of risk, and *caveat subscriptor*. This may be attributed to the legislature's acknowledgment of the consumer's inferior bargaining position and the legislature's resolve to protect the consumer against the harsh effects of these principles by way of relevant provisions in the CPA.<sup>651</sup>
- The CPA supports and promotes constitutional values and ideals.<sup>652</sup>
- The efforts to use plain language in agreements is a move in the right direction, although section 22 can be criticised for not being entirely clear.<sup>653</sup>
- The efforts to prohibit unfairness and unconscionable provisions in agreements represent a positive move to protect consumers and apply generally to all consumer agreements.<sup>654</sup>
- The intention of the legislature to establish alternative bodies that are intended to be easily accessible and affordable for consumers to resolve disputes, is also a move in the right direction – even if currently ineffective.<sup>655</sup>
- Section 2(10) which preserves common-law rights is commendable, although the intention of the legislature to make the common law available to suppliers is not entirely clear.<sup>656</sup>
- Section 52 enables a consumer to access the courts directly, but this could be a double edged sword as court proceedings can be time consuming and costly, and access to court in terms of section 52 is a remedy of last resort.<sup>657</sup>

I have now analysed and indicated points of criticism regarding section 14 of the CPA. This has highlighted both the advantages and disadvantages section 14 holds for parties to a fixed-term contract. Now that the fixed-term regime under the CPA has been evaluated, I may proceed to a comparative study of the Consumer Protection Fair Trading Act in Singapore in Chapter 5 in which I shall assess the position of consumers in Singapore in contracts similar to fixed-term contracts intended under section 14 of the CPA. In Chapter 6, the same process will be adopted with regard to the United Kingdom.

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<sup>650</sup> See the discussion in paras 4.2.3.7.7 and 4.2.3.7.9.

<sup>651</sup> Para 4.2.3.7.1.

<sup>652</sup> Paras 4.2.2.1, 4.2.3.1, 4.2.3.2 and 4.2.3.3.

<sup>653</sup> Para 4.3.2.5.

<sup>654</sup> Para 4.3.2.3.

<sup>655</sup> Para 4.3.7.

<sup>656</sup> Para 4.2.4.

<sup>657</sup> Para 4.3.2.6.

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## CHAPTER FIVE: The Law of Singapore: Consumer protection and fixed-term agreements

### 5.1 Introduction

Singapore is an international commercial centre.<sup>1</sup> It shares a common heritage with South Africa and, as former British colonies, both are members of the Commonwealth of Nations,<sup>2</sup> and both have common-law systems.<sup>3</sup> The South African judiciary<sup>4</sup> and other quasi-legal and administrative authorities<sup>5</sup> regard Singapore's consumer policies highly. The legislature in Singapore regularly updates its consumer protection legislation and recently expanded the mandate of the Competition and Consumer Commission<sup>6</sup> to act proactively.<sup>7</sup> In addition, the Consumer Protection Association in Singapore (CASE) provides effective and accessible consumer information and assistance on its website.<sup>8</sup> A comparison with equivalent Singapore legislation may prove useful in addressing the shortcomings identified in section 14 of the CPA.<sup>9</sup>

I first provide background to the consumer protection regime in Singapore, and then analyse, discuss and evaluate the relevant provisions in the Consumer Protection (Fair Trading) Act.<sup>10</sup> I then highlight sections of the Unfair Contract Terms Act<sup>11</sup> relevant to the scope of this thesis. Aspects of consumer-related judgments that are

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<sup>1</sup> Chua (1998) *Urban Consumption* 981-1000.

<sup>2</sup> See <http://www.commonwealthofnations.org/country/africa/> (date of use: 13 November 2019) and <http://www.commonwealthofnations.org/country/asia/> (date of use: 13 November 2019).

<sup>3</sup> The common law in Singapore is based on the common law of England, see [https://uk.practicallaw.thomsonreuters.com/w-008-9647?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/w-008-9647?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) (date of use: 13 November 2019) and <https://www.singaporelawwatch.sg/About-Singapore-Law/Overview> (date of use: 13 November 2019). The common law in South Africa is based mainly on Roman-Dutch law, although also influenced to an extent by British law. See the discussion in Ch 3 paras 3.1.1 and 3.1.2. The two countries have a good diplomatic relationship and aim to improve mutual tourism and trade. See <http://www.thediplomaticsociety.co.za/archive/archive/746-south-africa-and-singapore-partnership-continues-to-grow-stronger> (date of use: 13 November 2019).

<sup>4</sup> Binns-Ward (2017) *JCCLP* 2.

<sup>5</sup> See Complaint 201703-0012601 (14 March 2017) where the ombud Melville referred to the case of *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2005] 1 SLR (R) 502 (*Chwee*). The *Chwee* judgment is discussed in para 5.5.3 below.

<sup>6</sup> Commission. The Commission was established in terms of s 3 of the Competition Act (Cap 50B). The powers of the Commission are provided for in ss 12G-12J of the Consumer Protection (Fair Trading) Act (Cap 52A) (CPFTA).

<sup>7</sup> Sections 12G-12V of the CPFTA, amended in 2016.

<sup>8</sup> See <https://www.case.org.sg/> (date of use: 13 November 2019). The CASE is a non-profit, non-governmental association registered as such with the Registry of Societies in Singapore. It aims to protect consumer interests by providing information and education and by ensuring fair and ethical trade practices in business. For the history of the CASE see <https://www.case.org.sg/history.aspx> (date of use: 13 November 2019).

<sup>9</sup> See Ch 4 para 4.5 where these shortcomings are listed.

<sup>10</sup> Hereafter the CPFTA. This Act came into force on 1 March 2004.

<sup>11</sup> (Cap 396) (Original Enactment UK 1977 c 50). Applicable from 12 November 1993 (hereafter the UCTA).

of importance to this study are also analysed to identify any pitfalls or lessons to be learnt from the Singaporean experience.

This chapter is not a comprehensive study of the history, background, and development of consumer law and legislation in Singapore. It does not include an analysis of Singapore's common-law of contract, although common-law principles are touched on if and where relevant.

I conclude the chapter by highlighting the advantages and disadvantages of consumer protection legislation in Singapore in an attempt to find solutions to the shortcomings identified in the CPA.<sup>12</sup>

## 5.2 Background and history

Singapore was a British colony from 1819 to 1963 before it became part of Malaysia<sup>13</sup> until its independence on 9 August 1965.<sup>14</sup> Because of its long association with England, it shares a legislative history and common-law heritage.<sup>15</sup> The automatic application of English law in Singapore only ended with the Application of the English Law Act (Cap 7A) in 1993.<sup>16</sup>

The Constitution of the Republic of Singapore is not a single document but a rearrangement of the 1963 State Constitution, the Republic of Singapore Independence Act, and the Federal Constitution of Malaysia.<sup>17</sup>

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<sup>12</sup> See Ch 4 para 4.5.

<sup>13</sup> See <https://www.nationsonline.org/oneworld/History/Singapore-history.htm> (date of use: 15 May 2019); [https://en.wikipedia.org/wiki/History\\_of\\_Singapore](https://en.wikipedia.org/wiki/History_of_Singapore) (date of use: 15 May 2019).

<sup>14</sup> See <https://www.bbc.com/news/world-asia-15971013> (date of use: 24 April 2019).

<sup>15</sup> South Africa does not share the same legal history, see Ch 3 para 3.1. Yu <https://www.legco.gov.hk/yr10-11/english/sec/library/1011in11-e.pdf> 10 (date of use: 24 April 2019). For an early article on consumer protection and the need for better protection in Singapore, see Sinnadurai (1969) *Sing L Rev* 107-126.

<sup>16</sup> See <https://www.singaporelawwatch.sg/About-Singapore-Law/Overview> (date of use: 20 May 2019) and [http://www.singaporelegalhistory.org/index.php?title=The\\_Reception\\_of\\_English\\_Law](http://www.singaporelegalhistory.org/index.php?title=The_Reception_of_English_Law) (date of use: 20 May 2019).

<sup>17</sup> See <https://www.supremecourt.gov.sg/news/events/magna/our-constitution#start> (date of use: 30 July 2019). This is officially known as an authorised reprint. The current Constitution is the 1999 reprint, see <https://sso.agc.gov.sg/Act/CONS1963> (date of use: 31 July 2019). For a short history of the Constitution of Singapore see <https://www.supremecourt.gov.sg/news/events/magna/our-constitution#start> (date of use: 30 July 2019). For a discussion and critique of the Singapore Constitution see Tushnet <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=4654&context=clr> (date of use: 31 July 2019); Silverstein <http://cornelllawreview.org/files/2015/10/Silversteinfinal.pdf> (date of use: 31 July 2019). The Constitution of Singapore is regarded as a 'secular constitution', as it accommodates the different religions in Singapore. For further discussion see Neo (2016) *Oxford Journal of Law and Religion* 431-456.

Legislation that could potentially affect consumers in Singapore includes the Misrepresentation Act,<sup>18</sup> the Unfair Contract Terms Act,<sup>19</sup> and the CPFTA.<sup>20</sup> The most important of these, which is also the focus of this chapter, is the CPFTA,<sup>20</sup> enacted in 2003 as a result of successful and sustained campaigns by the Consumer Association of Singapore to curb the exploitation of consumers. The primary aim of the UCTA is to protect consumers against exemption clauses in contracts in cases of negligence. In other instances it nullifies exemption clauses, or limits them by demanding that they be reasonable.<sup>21</sup> The UCTA is mentioned briefly where relevant, but is not analysed in any depth as it is not directly relevant to fixed-term contracts.<sup>22</sup> The Small Claims Tribunal Act<sup>23</sup> is referred to if and where necessary in considering jurisdiction.<sup>24</sup>

The stated purpose of the CPFTA<sup>25</sup> is to protect consumers against unfair practices. Two important considerations played a role in its drafting: the consumer's obligation to answer for his or her own acts and decisions when entering into an agreement; and the balancing of this responsibility with the interests of traders who need legal and financial certainty when entering into agreements.<sup>26</sup> This emphasises the

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<sup>18</sup> Cap 390 1994 Rev Ed Sing, (MA). The purpose of the MA in the preamble thereof is 'to amend the law relating to innocent misrepresentations'. Booysen notes that courts in Singapore do not insist on plaintiffs formally pleading the MA, and emphasises that this is the correct approach in consumer matters as consumers are not legal experts and do not necessarily have legal representation. She also remarks that there are relatively few cases on the UCTA and the MA. Booysen (2016) *SJLS* 219, 231, 236, 246-248.

<sup>19</sup> Cap 396 1994 Rev Ed Sing (UCTA) which is similar to the United Kingdom's Unfair Contract Terms Act.

<sup>20</sup> This Act came into force on 1 March 2004, Singapore: Public Consultation on the Consumer Protection (Fair Trading) Act (2008) available at <https://doi.org/10.1080/03050710801942704> (date of use: 26 May 2019) 149-211.

<sup>21</sup> See ss 3, 4 and 11 of the UCTA.

<sup>22</sup> Except, perhaps, by analogy to s 10(2) of the CPFTA, and where applicable and relevant in case law.

<sup>23</sup> (Cap 308) Act 27 of 1984 available at <https://sso.agc.gov.sg/Act/SCTA1984> (date of use: 26 May 2019). The Small Claims Tribunal is hereafter referred to as the SCT.

<sup>24</sup> Note the extended jurisdiction in the SCT under s 7 of the CPFTA.

<sup>25</sup> This purpose is stated in the preamble to the CPFTA, although it is not expressly referred to as a preamble, it is directly under the heading.

<sup>26</sup> Parliamentary debate of 10 November 2003 on the Consumer Protection (Fair Trading) Bill, Session 1 Vol 76 Sitting 23 available at [https://sprs.parl.gov.sg/search/topic?reportid=-25\\_20031110\\_s0004\\_T0002](https://sprs.parl.gov.sg/search/topic?reportid=-25_20031110_s0004_T0002) (date of use: 15 May 2019) (hereafter Parliamentary Debate 10 November 2003). It is interesting to observe the important role parliamentary debates on the CPFTA and its amendments played in the courts' interpretation of the Act. Courts consult parliamentary debates when adjudicating a specific Act to establish the exact purpose and aims of the legislature with specific legislation, for instance, *Freely Pte Ltd v Ong Kaili and others* [2010] 2 SLR 1065 (*Freely v Ong*) see the discussion in para 5.5.1. Booysen (2016) *SJLS* 219, 223, also see the parliamentary statement by Minister at the time of the introduction of the CPFTA on 11 November 2003, available at <https://sprs.parl.gov.sg/search/report?sittingdate=11-11-2003> (date of use: 29 May 2020); Chandran (2004) *SJLS* 192. Also see the publication by Gupta (2008) *Law Gazette* (all 3 pages), regarding balancing the rights of consumers and healthy competition law principles and legislation, available at <https://www-lawnet-sg.libproxy1.nus.edu.sg/lawnet/group/lawnet/page->



delicate balance between these interests, and it is instructive, when evaluating case law, to observe how the courts in Singapore achieve this.<sup>27</sup> The legislature made it clear that consumers are expected to act responsibly when entering into consumer transactions, and that the Singaporean legislature did not intend unnecessary market regulation by way of prescriptive legislation.<sup>28</sup> The legislature also chose not to impose criminal sanctions on perpetrators.<sup>29</sup>

The CPFTA ushered in significant changes to the consumer-law regime. It provided civil remedies for wronged consumers<sup>30</sup> and introduced cooling-off periods in certain instances.<sup>31</sup> After the global financial crisis in 2007–2008,<sup>32</sup> the scope of the CPFTA

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<sup>27</sup> See para 5.5 below.

<sup>28</sup> This is in stark contrast to the CPA where consumers are only protected, and not provided with effective rights and obligations. See Ch 4 paras 4.2.3.7 and 4.5.

<sup>29</sup> Chandran *Business Law* 173. The criminalisation of transgressions of the CPFTA was discussed in Parliament but never introduced in the CPFTA, Parliamentary Debate 10 November 2003 available at [https://sprs.parl.gov.sg/search/topic?reportid=-25\\_20031110\\_s0004\\_T0002](https://sprs.parl.gov.sg/search/topic?reportid=-25_20031110_s0004_T0002) (date of use: 27 May 2019). This is one of the highly criticised aspects of the CPFTA and is discussed below. See Chandran *Business Law* 174; Chandran (2004) *SJLS* 222; and para 5.3.2.10. Chandran mentions that a possible reason for this could be that the introduction of criminal sanctions would further increase the expense of running a business in Singapore. He also argues that the additional remedies that provide that perpetrators can enter into a voluntary agreement of future compliance (s 8(1) of CPFTA) thus preventing further legal action, could perhaps compensate to an extent for the lack of criminal sanctions. Chandran (2004) *SJLS* 222.

<sup>30</sup> Chandran (2004) *SJLS* 217–220, 222–223.

<sup>31</sup> See s 11 of the CPFTA on the right to cancel certain contracts within a cancellation period. The term ‘cooling-off’ is not used in the CPFTA. It is a general term used when referring to the right to cancel in certain prescribed circumstances. See Chandran (2004) *SJLS* 220–222.

<sup>32</sup> See <https://www.rba.gov.au/education/resources/explainers/the-global-financial-crisis.html> (date of use: 24 April 2019).

was extended in 2009 to include financial products and services.<sup>33</sup> In addition, the amended Act regulates unconscionable conduct not previously covered.<sup>34</sup>

The CASE is committed to ‘protecting consumers (sic) interest through information and education, and promoting an environment of fair and ethical trade practices’.<sup>35</sup> It does this mainly by educating consumers, working with retailers, and lobbying for effective legislation or legislative amendments when needed – a three-pronged approach which considers all parties involved in consumer transactions.<sup>36</sup> The CASE has an interesting and informative website with general advice for consumers and includes consumer alerts, statistics, and case studies. The CASE website also offers guidance and industry-specific tips for consumers; for instance on electronic equipment, electricians, and insurance.<sup>37</sup> It even has an alphabetical ‘company alert list’ that lists businesses that have had numerous complaints laid against them in order to caution consumers when doing business with these traders.<sup>38</sup>

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<sup>33</sup> These were previously excluded. See Singapore: Public Consultation on the Consumer Protection (Fair Trading) Act (2008) *Commonw L Bulletin* 34:1 149-211 <https://doi.org/10.1080/03050710801942704> (date of use: 26 May 2019); Singapore: Public consultation on the Consumer Protection (Fair Trading) Act (2008) 34 *Commw L Bull* 149-150 [https://heinonline-org.libproxy1.nus.edu.sg/HOL/Page?collection=journals&handle=hein.journals/commwlb34&id=154&men\\_tab=srchresults](https://heinonline-org.libproxy1.nus.edu.sg/HOL/Page?collection=journals&handle=hein.journals/commwlb34&id=154&men_tab=srchresults) (date of use: 27 May 2019); Tan [https://www-lawnet-sg.libproxy1.nus.edu.sg/lawnet/group/lawnet/page-content?p\\_p\\_id=legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet&p\\_p\\_lifecycle=1&p\\_p\\_state=normal&p\\_p\\_mode=view&p\\_p\\_col\\_id=column-2&p\\_p\\_col\\_count=1&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_action=openContentPage&contentDocID=/Commentaries/61059-M.xml&queryStr=\(Consumer%20protection%20Fair%20trading%20Act%20Singapore\)%20AND%20\(Tan%20A%20Legal%20update\)](https://www-lawnet-sg.libproxy1.nus.edu.sg/lawnet/group/lawnet/page-content?p_p_id=legalresearchpagecontent_WAR_lawnet3legalresearchportlet&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_p_col_id=column-2&p_p_col_count=1&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_action=openContentPage&contentDocID=/Commentaries/61059-M.xml&queryStr=(Consumer%20protection%20Fair%20trading%20Act%20Singapore)%20AND%20(Tan%20A%20Legal%20update)) (date of use: 27 May 2019); Yu available at <https://www.legco.gov.hk/yr10-11/english/sec/library/1011in11-e.pdf> (date of use: 24 April 2019) para 3.4; Tan [https://www-lawnet-sg.libproxy1.nus.edu.sg/lawnet/group/lawnet/page-content?p\\_p\\_id=legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet&p\\_p\\_lifecycle=1&p\\_p\\_state=normal&p\\_p\\_mode=view&p\\_p\\_col\\_id=column-2&p\\_p\\_col\\_count=1&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_action=openContentPage&contentDocID=/Commentaries/78100-M.xml&queryStr=\(Consumer%20protection%20Fair%20trading%20Act%20Singapore\)%20AND%20\(The%20legal%20implications\)](https://www-lawnet-sg.libproxy1.nus.edu.sg/lawnet/group/lawnet/page-content?p_p_id=legalresearchpagecontent_WAR_lawnet3legalresearchportlet&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_p_col_id=column-2&p_p_col_count=1&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_action=openContentPage&contentDocID=/Commentaries/78100-M.xml&queryStr=(Consumer%20protection%20Fair%20trading%20Act%20Singapore)%20AND%20(The%20legal%20implications)) (date of use: 27 May 2019).

<sup>34</sup> Yu available at <https://www.legco.gov.hk/yr10-11/english/sec/library/1011in11-e.pdf> (date of use: 24 April 2019). The CASE and the Singapore Tourism Board were appointed as the bodies responsible for supervising unfair trade practices. Since 1 April 2018 the Competition and Consumer Commission of Singapore is responsible for administering and enforcing the provisions of the CPFTA. See Chia & Vijakumar available at [https://www-lawnet-sg.libproxy1.nus.edu.sg/lawnet/group/lawnet/page-content?p\\_p\\_id=legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet&p\\_p\\_lifecycle=1&p\\_p\\_state=normal&p\\_p\\_mode=view&p\\_p\\_col\\_id=column-2&p\\_p\\_col\\_count=1&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_action=openContentPage&contentDocID=/Commentaries/100134.xml&queryStr=\(Consumer%20protection%20Fair%20trading%20Act%20Singapore\)%20AND%20\(Caveat%20Emptor\)](https://www-lawnet-sg.libproxy1.nus.edu.sg/lawnet/group/lawnet/page-content?p_p_id=legalresearchpagecontent_WAR_lawnet3legalresearchportlet&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_p_col_id=column-2&p_p_col_count=1&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_action=openContentPage&contentDocID=/Commentaries/100134.xml&queryStr=(Consumer%20protection%20Fair%20trading%20Act%20Singapore)%20AND%20(Caveat%20Emptor)) (date of use: 27 May 2019).

<sup>35</sup> See <https://www.case.org.sg/aboutus.aspx> (date of use: 24 April 2019).

<sup>36</sup> See <https://www.case.org.sg/aboutus.aspx> (date of use: 24 April 2019).

<sup>37</sup> See [https://www.case.org.sg/consumer\\_guides.aspx](https://www.case.org.sg/consumer_guides.aspx) (date of use: 24 April 2019).

<sup>38</sup> See <https://www.case.org.sg/consumeralertlist.aspx> (date of use: 24 April 2019).

The Competition and Consumer Commission of Singapore<sup>39</sup> has been responsible for the application, administration, and enforcement of the CPFTA since 1 April 2018.<sup>40</sup>

### 5.3 Consumer Protection (Fair Trading) Act

#### 5.3.1 Introduction

The CPFTA is a short, well-constructed Act consisting of four parts, comprising 21 sections and four schedules.<sup>41</sup> The purpose of the CPFTA is stated as: ‘to protect consumers against unfair practices and to give consumers additional rights in respect of goods that do not conform to contract, and for matters connected therewith’.<sup>42</sup>

In practice, the effect of the CPFTA is that suppliers must provide consumers with information that could potentially affect consumers’ decisions on whether or not to enter into an agreement.<sup>43</sup> This principle is known as ‘information-based consumer

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<sup>39</sup> See para 5.1 above.

<sup>40</sup> See the definition of ‘Commission’ in s 2(1) of the CPFTA, amended by Act 10 of 2018; Chia & Vijakumar [\(https://www-lawnet-sg.libproxy1.nus.edu.sg/lawnet/group/lawnet/page-content?p\\_p\\_id=legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet&p\\_p\\_lifecycle=1&p\\_p\\_state=normal&p\\_p\\_mode=view&p\\_p\\_col\\_id=column-2&p\\_p\\_col\\_count=1&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_action=openContentPage&contentDocID=/Commentaries/100134.xml&queryStr=\(Consumer%20protection%20Fair%20trading%20Act%20Singapore\)%20AND%20\(Caveat%20Emptor\)\)](https://www-lawnet-sg.libproxy1.nus.edu.sg/lawnet/group/lawnet/page-content?p_p_id=legalresearchpagecontent_WAR_lawnet3legalresearchportlet&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_p_col_id=column-2&p_p_col_count=1&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_action=openContentPage&contentDocID=/Commentaries/100134.xml&queryStr=(Consumer%20protection%20Fair%20trading%20Act%20Singapore)%20AND%20(Caveat%20Emptor)) (date of use: 27 May 2019). For an explanation of their powers see the discussion in para 5.1.

<sup>41</sup> The Act is divided into Part I which explains terminology; Part II dealing with unfair practices; and Part III which provides additional rights to consumers in respect of goods that do not conform to contract (Lemon Law). Part IIIA sets out the investigative powers of the Commission and the court; Part IIIB explains the offences; and finally, Part IV contains general provisions. The first Schedule excludes certain transactions and Schedule 2 lists specific unfair practices. The third Schedule has been repealed. Schedule 4 explains how certain terms in the Act should be interpreted, and the fifth and final Schedule lists events of which the Commission should be notified. There appears to be a difference of opinion as to the origin of the CPFTA with some writers of the opinion that it is of Canadian origin – the Saskatchewan Consumer Protection Act Cap C 30.11996 Statutes of Saskatchewan. However, it also shows similarities to the Australian Trade Practices Act 51 of 1974, Commonwealth Consolidated Acts; the Alberta Fair Trading Act (Cap F2, 2000 Revised Statutes of Alberta); the British Columbia Trade Practices Act (Cap 457, 1996, Consolidated Statutes of British Columbia); and New Zealand consumer legislation (New Zealand Fair Trading Act, Act 121 of 1986, New Zealand Statutes). See Chandran (2004) *SJLS* 192, 202; the *Freely v Ong* case 1069 1090-1091; and Paterson & Wong (2016) *SAC LJ* 1179 1081-1082. Others contend that certain parts of the CPFTA- eg, ‘unfair advantage-taking’ – resemble the equitable doctrine of unconscionable dealing, which is of English origin, and used in Australia. See Paterson & Wong (2016) *SAC LJ* 1079, 1093.

<sup>42</sup> Preamble to the CPFTA stating the purpose of the Act.

<sup>43</sup> Sections 4 and 5(3)(b) of the CPFTA. Also see the Second Schedule to the CPFTA which lists specific unfair practices, many of which relate to information, misleading information, or omissions in information – eg, Part 1 items 2 and 20. The information referred to in s 4 will probably be a ‘material fact’ which is defined in s 2(1) of the CPFTA as: “‘material fact’ means any information

protection', and is aimed at ensuring the fair treatment of consumers.<sup>44</sup> Suppliers are held liable for the information provided, or for the lack thereof.<sup>45</sup> The CPFTA encourages consumers to settle conflicts and disputes with suppliers,<sup>46</sup> and the failure to attempt to resolve conflicts could negatively affect the judgments of courts or referees.<sup>47</sup> The Act also provides contravening suppliers with the opportunity to take remedial action by providing undertakings to correct unlawful practices to prevent legal action.<sup>48</sup> One view of this effect on consumers is that it is a move away from the adage 'buyers beware' to one of 'sellers be fair'.<sup>49</sup>

Although the CPFTA does not contain a counterpart for section 14 of the CPA, the purpose of this comparison is to consider if there are better practices in Singapore regarding the matters covered by section 14 of the CPA, and whether section 14 is indeed essential to the South African consumer protection regime.

So, the CPFTA has a completely different approach to consumer protection and a direct comparison between it and the CPA is not possible. However, to understand the conceptual basis on which the Singaporean legislation seeks to protect consumers, a discussion of the definitions in the CPFTA, and those sections which are pertinent to fixed-term contracts under the CPA, is necessary.

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that a supplier knows or ought reasonably to know would affect the decision of a consumer to enter into a consumer transaction'. An example of a material fact would, eg, be representing that goods are new and have not been used, while the goods have been altered, reconditioned, reclaimed, or have deteriorated. See the list of specific unfair practices in Part 1 of Schedule 2.

<sup>44</sup> The CPA also protects the consumer's right to information and disclosure. The plain language provision in s 22 of the CPA is an example, and this right to disclosure and information promotes fairness. See the discussion in Ch 4 para 4.3.2.5. Other sections in the CPA that could also be regarded as information-based are subs 14(2)(c) and (d).

<sup>45</sup> This may pose risks for professionals, eg, lawyers, when they advise clients and omit information. It is also difficult to establish beforehand what constitutes material information in given circumstances. Sometimes an omission can also be ascribed to lack of information provided by clients. See Loke (2004) *Law Gazette* 1-2; Paterson & Wong (2016) *SAC LJ* 1089-1092. Information-based consumer protection can also be criticised as it may provide so much information that a consumer is discouraged from paying attention to or reading all that is provided. In addition, illiterate consumers will not be able to access the information and disclosures, although the CPA in s 3(1)(b), and the CPFTA in s 4(c), both have provisions aimed at protecting vulnerable persons. Courts have the jurisdiction and powers provided for in s 7(4) of the CPFTA, which are discussed in para 5.3.2.10, but which may briefly be summarised as: an order for restitution of money or property; the award of damages, an order of specific performance, the repair of goods, or the provision of parts; and an order varying the contract terms and conditions.

<sup>46</sup> This aspect is discussed in greater detail in para 5.3.2.9.5.

<sup>47</sup> Chandran *Business Law* 172. This aspect is more fully discussed in para 5.3.2.9.5.

<sup>48</sup> Loke et al *A Consumer's Guide* 3.

<sup>49</sup> For a discussion of *caveat emptor* and freedom of contract see Ch 2 paras 2.3.1 and 2.4.2. Loke et al *A Consumer's Guide* 4; this is in apparent contrast to the statement made by the Minister of Trade in Parliament, when he expressly stated that buyers should answer for their own acts and decisions, available at <https://sprs.parl.gov.sg/search/report?sittingdate=10-11-2003> (date of use: 29 May 2020).

### 5.3.2 Relevant sections and Schedules

#### 5.3.2.1 Definitions

I first analyse relevant definitions in the CPFTA before discussing provisions in the CPFTA relevant to fixed-term contracts.

##### 5.3.2.1.1 Consumer<sup>60</sup>

“Consumer” means an individual who,<sup>51</sup> otherwise than exclusively in the course of business

- (a) receives or has the right to receive goods or services from a supplier; or
- (b) has a legal obligation to pay a supplier for goods or services that have been or are to be supplied to another individual;’

This definition excludes juristic persons as it aims to protect the individual consumer who enters into an agreement in his private capacity, and not exclusively for or as the representative of a business.<sup>52</sup> In terms of this definition a ‘consumer’ includes both A and B as ‘consumers’ in the situation where A buys a cell phone for or on behalf of B, from C.<sup>53</sup>

The exclusion of small businesses from the application of the CPFTA has been criticised, and the court has acknowledged that small businesses could benefit from protection similar to that available to individuals when they are in a weaker bargaining position.<sup>54</sup> The position in South Africa regarding juristic persons, is that these entities can be protected by the provisions in the CPA. There is a threshold value at which a juristic person with an annual turnover within the threshold values determined by the Minister from time to time, is regarded as a consumer for

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<sup>50</sup> Section 2(1) of the CPFTA.

<sup>51</sup> The term ‘individual’ is not defined in the CPFTA. Chandran *Business Law* 167 contends that the term probably excludes businesses, except when a sole proprietor or member of a partnership deals purely in his or her personal capacity.

<sup>52</sup> Chandran *Business Law* 167 contends that ‘consumer’ probably does not include companies, statutory bodies, or other incorporated bodies. See too Booyesen (2016) *SJLS* 226.

<sup>53</sup> An example is where someone receives goods as a gift, the receiver of the gift (B in this instance) will also be regarded as a consumer as he or she received or had the right to receive the goods in question. This also applies when a consumer rents a car – he or she will be regarded as a consumer as regards the car. See Chandran *Business Law* 168.

<sup>54</sup> *Jurong Port Pte Ltd v Huatong Inland Transport Service Pte Ltd* [2009] 4 SLR (R) 53 (hereafter *Jurong*), although this decision was based on contract law and the court referred to the UCTA in this specific paragraph and its definition of consumer, this principle also applies to the CPFTA. Booyesen refers to the situation in Australia where under the Australian Consumer Law certain businesses, other than public listed companies, are protected against unconscionable conduct in prescribed circumstances. She also refers to the application of the UCTA. Booyesen (2016) *SJLS* 219, 226. Note that in the Lemon Law the definition of consumer is wider – see para 5.3.2.7. Also compare this to the definition in the UCTA in para 5.4 below.

purposes of the CPA.<sup>55</sup> However, section 14(1) of the CPA expressly excludes contracts between juristic persons from the application of section 14 as a whole.<sup>56</sup>

#### 5.3.2.1.2 *Consumer transaction*<sup>57</sup>

“Consumer transaction” means —

- (a) the supply of goods or services by a supplier to a consumer as a result of a purchase, lease, gift, contest or other arrangement; or
- (b) an agreement between a supplier and a consumer, as a result of a purchase, lease, gift, contest or other arrangement, in which the supplier is to supply goods or services to the consumer or to another consumer specified in the agreement,

but does not include any transaction specified in the First Schedule;’

Subsection (a) of this definition implies that no agreement is necessary.<sup>58</sup> Subsection (b) caters for those circumstances where there is an agreement. As discussed under the definition of consumer, a transaction will also cover the circumstances where consumer A buys goods or services for use by consumer B, as a gift or otherwise.

There is no time limit on the duration of agreements or transactions in Singapore, and therefore no equivalent to section 14 of the CPA.<sup>59</sup> This does not appear to be a problem in practice in Singapore, as no judgments could be found dealing with the duration of fixed-term agreements. There has been concern in Singapore regarding prepaid deals, specifically prepaid gym contracts,<sup>60</sup> and the opinion was expressed that protection was needed for consumers when the businesses of such suppliers were liquidated.<sup>61</sup> Nevertheless, it was emphasised that business should

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<sup>55</sup> Jacobs et al (2010) *PELJ* 316.

<sup>56</sup> See the discussion in Ch 4 para 4.2.3.7.6.

<sup>57</sup> Section 2(1) CPFTA. Although the term ‘consumer transaction’ is defined in the CPFTA, the terms contract and agreement are also used in the CPFTA, although not defined, and therefore these terms will be used interchangeably in this discussion.

<sup>58</sup> The exceptions in Schedule 1 relate to the acquisition of an estate or an interest in immovable property, see Chandran *Business Law* 166. These exceptions do not include leases and time-share of immovable property. Employment contracts are excluded in the qualification of the definition of ‘consumer transaction’ in s 1(b) of Schedule 1 to the CPFTA.

<sup>59</sup> The only reference to a time limit, express or implied, is in Schedule 3 Part 2 item 3(1)(b) where it is stated that ‘applicable agreement’ must be interpreted to mean that the price of goods is to be paid by two or more instalments.

<sup>60</sup> Apparently s 14 of the CPA was specifically aimed at protecting consumers entering into long-term gym contracts. See Ch 4 para 4.2.3.7.1.

<sup>61</sup> Ng available at <https://www.todayonline.com/singapore/mps-lawyers-call-more-safeguards-consumers-buying-prepaid-deals> (date of use: 20 June 2019) 1.

not be stifled by safety measures, and insurance was proposed as an alternative solution to protect consumers.<sup>62</sup>

The provisions of the CPFTA cover all transactions not expressly excluded in Schedule 1, which implies that contracts for a fixed term are included in the CPFTA, as fixed-term contracts are not excluded in the schedule.<sup>63</sup> There is no limitation in the CPFTA on the maximum duration of fixed-term contracts,<sup>64</sup> which, of course, differs from the position under the CPA in South Africa.

#### 5.3.2.1.3 Goods<sup>65</sup>

“Goods” means –

- (a) any personal property, whether tangible or intangible, and includes –
  - (i) chattels that are attached or intended to be attached to real property on or after delivery; and
  - (ii) financial products and credit, including credit extended solely on the security of land;
- (b) any residential property; or
- (c) a voucher;’

The definition of ‘goods’ is comprehensive. No goods, other than those defined in the section will be regarded as goods.<sup>66</sup> The reference to residential property in the CPFTA relates to the lease or rental of that property and not its sale as the latter is excluded from the provisions of the CPFTA.<sup>67</sup>

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<sup>62</sup> This view reflects the Minister’s view that business should not be repressed. See Parliamentary Debate on 10 November 2003 available at [https://www.lawnet-sg.libproxy1.nus.edu.sg/lawnet/group/lawnet/page-content?p\\_p\\_id=legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet&p\\_p\\_lifecycle=1&p\\_p\\_state=normal&p\\_p\\_mode=view&p\\_p\\_col\\_id=column-2&p\\_p\\_col\\_count=1&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_action=openContentPage&contentDocID=/SPRS/025\\_20031110\\_S0004\\_T0002.xml&queryStr=\(Consumer%20protection%20Fair%20trading%20Act%20Singapore\)](https://www.lawnet-sg.libproxy1.nus.edu.sg/lawnet/group/lawnet/page-content?p_p_id=legalresearchpagecontent_WAR_lawnet3legalresearchportlet&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_p_col_id=column-2&p_p_col_count=1&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_action=openContentPage&contentDocID=/SPRS/025_20031110_S0004_T0002.xml&queryStr=(Consumer%20protection%20Fair%20trading%20Act%20Singapore)) (date of use: 27 May 2019).

<sup>63</sup> These types of contract (cell phone purchase with airtime package, for example) could also for argument’s sake be covered by credit legislation or hire purchase legislation when finance for a loan is involved.

<sup>64</sup> Except for the minimum duration for time-share contracts, which should be longer than three years. See para 5.3.2.5.

<sup>65</sup> Section 2(1) CPFTA.

<sup>66</sup> Also see the discussion in Chandran *Business Law* 165.

<sup>67</sup> Excluded by the qualification of ‘consumer transactions’ in s 1(a) of Schedule 1 to the CPFTA which reads: ‘The term “consumer transaction” does not include any of the following transactions: (a) acquisition of an estate or interest in any immovable property (but not including any lease of residential property granted in consideration of rent or any time share contract).’

There is also a financial limit to claims detailed in section 6(6)<sup>68</sup> of the CPFTA.<sup>69</sup> The limit is relatively low, according to critics, which restricts the use of the CPFTA and its potential benefit for consumers. The practical effect is that the CPFTA is not sufficiently used and so does not have optimal impact.<sup>70</sup>

#### 5.3.2.1.4 Services<sup>71</sup>

“Services” includes –

- (a) a service offered or provided that involves the addition to or maintenance, repair or alteration of goods or any residential property;
- (b) a membership in any club or organisation if the club or organisation is a business formed to make a profit for its owners;
- (c) the right to use time share accommodation under a time share contract; and
- (d) financial services;’

This is not an exhaustive definition and Chandran argues that professional services are probably included by implication.<sup>72</sup> Notably, contracts of employment are excluded.<sup>73</sup>

#### 5.3.2.1.5 Supplier<sup>74</sup>

“Supplier”

means a person who, in the course of the person’s business –

- (a) provides goods or services to consumers;
- (b) manufactures, assembles or produces goods;

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<sup>68</sup> Currently S\$ 30 000. This was the equivalent of approximately R 370 000 on 18 June 2020.

<sup>69</sup> Section 6(2) of the CPFTA.

<sup>70</sup> Chandran *Business Law* 174.

<sup>71</sup> Section 2(1) CPFTA.

<sup>72</sup> Chandran (2004) *SJLS* 194.

<sup>73</sup> In item 1b of Schedule I to the CPFTA. Previously certain financial services were also excluded, probably because they were already covered by other legislation. Chandran criticises this reason for the exclusion and also argues that some unfair practices were not covered by these other Acts, (CPFTA and UCTA), eg, using small print to obscure essential and material facts, or the use of oppressive terms that were not necessarily regulated by these Acts. See Chandran (2004) *SJLS* 195. The legislature deleted the exclusion on 4 August 2016, and these transactions are now covered by the CPFTA, see item 20 of Part 1 of Schedule 2 to the CPFTA regarding small print. The position regarding contracts of employment is similar to the position in South Africa under the CPA, see Ch 4 para 4.2.3.6.5.

<sup>74</sup> Section 2(1) CPFTA. Note that the term supplier is not used in the Lemon Law – see para 5.3.2.7 below.



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- (c) promotes the use or purchase of goods or services; or
- (d) receives or is entitled to receive money or other consideration as a result of the provision of goods or services to consumers,

and includes any employee or agent of the person, and the word “supply”, with its grammatical variations and cognate expressions, shall have corresponding meanings;’

It is clear, from this definition, that if a supplier concludes a private sale, for example of his or her personal second-hand cell phone or car, that sale will not be covered by the CPFTA as the transaction was entered in his or her personal capacity.<sup>75</sup>

The consumer can hold an employee or agent liable, because both are included in this definition of supplier.<sup>76</sup> It is not clear under what circumstances a consumer will choose to hold the employee or agent liable as it will generally be to his or her advantage to act against the supplier who should be in a stronger financial position<sup>77</sup> or be covered by insurance against liability. The supplier is also vicariously liable for the acts of its employee or agent.<sup>78</sup> This is similar to section 113 of the CPA.

Manufacturers, assemblers, producers, and promotion businesses are further included in the definition of supplier. It is unclear whether the consumer can hold such a business liable for unfair practices if he or she had no direct contact with the business.<sup>79</sup> Chandran contends that direct contact is not required for the following reasons:<sup>80</sup>

- If direct contact had been required, the legislature would not have included subsections (b) to (d) in the definition.
- Section 16 provides that a *bona fide* person who advertises, prints, distributes or supplies an advertisement in his ordinary course of business is not liable under the CPFTA for a representation or omission in that advertisement. This points to the fact that if the operation of the section was intended to be restricted to persons who had direct contact or agreements with the supplier, section 16 would not have been necessary.
- Agents and employees are expressly included in the definition, although they are not likely to have agreements with the consumer.
- When consumers receive gifts from suppliers, the consumer can hold the supplier liable despite there being no agreement in respect of the gift.<sup>81</sup>

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<sup>75</sup> Chandran *Business Law* 196.

<sup>76</sup> Chandran *Business Law* 167.

<sup>77</sup> Chandran (2004) *SJLS* 196.

<sup>78</sup> Section 5(3)(b) CPFTA; Chandran *Business Law* 167.

<sup>79</sup> Chandran *Business Law* 196.

<sup>80</sup> Chandran (2004) *SJLS* 196.

<sup>81</sup> Chandran (2004) *SJLS* 197.

- When a person receives goods paid for by another, the recipient can act against the supplier<sup>82</sup> even though he or she has no agreement with the supplier.<sup>83</sup>

A consumer can hold a manufacturer liable, despite the absence of a direct agreement between the parties, in the event of an unfair practice<sup>84</sup> which stems from statements, omissions, representations, or misrepresentations in the information or warranty document provided by the manufacturer together with the relevant goods. Because a promotions company can make misrepresentations or provide incorrect information during the promotion of a product, that company should ensure that the information conveyed in a promotion is accurate. The unfair practice must relate to a consumer transaction and must, therefore, be aimed at the consumer and not the supplier.<sup>85</sup> For instance, when an unfair practice occurs when manufacturers promote goods to suppliers to stock a certain product or range, and the promotional material is not directed at consumers, the manufacturers will not be guilty of an unfair practice under this section.

It is clear that when a consumer bases his or her action on unfair practice,<sup>86</sup> he or she can choose from a range of parties to hold liable: the manufacturer, assembler, promotions company, supplier, employee, or agent. However, a *bona fide* printer, distributor, or broadcaster cannot be held liable for an unfair practice.<sup>87</sup>

Section 7(3)<sup>88</sup> of the CPFTA might be relevant here, as it provides that actions in terms of the Act shall be deemed to be based on contract. However, section 7(3) only deals with jurisdictional matters<sup>89</sup> and cannot be taken to imply that an agreement is not a *sine qua non*. Section 7(3) merely provides that it is not necessary to prove the existence of an agreement. One could also argue that a claim does not have to be based on an agreement between the parties because section 5(1) provides that an unfair practice can take place before, during, and after the transaction.<sup>90</sup> Clearly, before the transaction no agreement exists.

From the above, it can be concluded that the CPFTA creates new statutory rights for consumers, which are not necessarily based on the existence of an agreement between the consumer and the party who may be held liable.<sup>91</sup> Therefore, a

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<sup>82</sup> Chandran (2004) *SJLS* 197.

<sup>83</sup> This is similar to the position in South Africa, see the discussion in Ch 4 para 4.2.3.6.1.

<sup>84</sup> See the discussion of unfair practice in par 5.3.2.1.6 below.

<sup>85</sup> Chandran (2004) *SJLS* 199.

<sup>86</sup> The consumer can only do this in the case of unfair practice, see para 5.3.2.1.6 below.

<sup>87</sup> Section 16 CPFTA.

<sup>88</sup> Section 7(3) reads: '(3) For the purposes of determining whether an action under section 6(1) exceeds the District Court limit or the Magistrate's Court limit within the meaning of the State Courts Act (Cap. 321), such an action shall be deemed to be a claim founded on contract.'

<sup>89</sup> Chandran 2004 *SJLS* 197 n 42.

<sup>90</sup> See the example provided by Chandran (2004) *SJLS* 197 n 42 and see Ch 4 para 4.3.2.2.

<sup>91</sup> Chandran (2004) *SJLS* 197.

consumer in Singapore has a wide choice of defendants whom he or she can hold liable when his or her action is based on an unfair practice under section 4.<sup>92</sup>

Similarly, in South Africa a consumer under section 56(1) read with section 61(1) of the CPA, can hold every person in the supply chain liable for harm provided for in section 61(5) of the CPA. However, the harm in section 61(5) of the CPA relates to death, injury, illness, and loss, and is not based on unfair practice as in section 4 of the CPFTA.

#### 5.3.2.1.6 *Unfair practice*

'Unfair practice' is defined in section 2 of the CPFTA as an unfair practice within the meaning of section 4 of the CPFTA.

The definition of 'unfair practice' is very brief. Sections 4<sup>93</sup> and 5<sup>94</sup> deal with the concept more fully.

#### 5.3.2.2 *Section 4*<sup>95</sup>

Section 4 aims to protect consumers against misleading or deceptive statements or omissions by the supplier. Section 4 also protects consumers against false claims by suppliers, or from being taken advantage of by suppliers. An unfair practice by a supplier includes an act or omission resulting in the reasonable deception and misleading of a consumer, the making of a false claim, the taking advantage of vulnerable consumers, and finally, the commission of an unfair practice as described in Part 1 of the Second Schedule.<sup>96</sup>

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<sup>92</sup> Sections 56(1) and 61(1) of the CPA contain similar provisions regarding product liability (as opposed to s 4 of the CPFTA which deals with unfair practice in Singapore). Sections 56(1) and 61(1) provide that the consumer can hold the whole supply chain liable in the circumstances provided for in these sections. Supply chain is defined in s 1 of the CPA as all the suppliers who contribute in turn to supply the goods or services to the consumer, whether it is a supplier, the producer, an importer, a retail merchant, or a service provider. See para 5.3.2.1.6.

<sup>93</sup> Section 4 of the CPFTA deals with the meaning of unfair practice.

<sup>94</sup> The definition of unfair practice in s 2 does not refer to s 5. Section 5 only provides for the circumstances surrounding an unfair practice.

<sup>95</sup> 4. 'It is an unfair practice for a supplier, in relation to a consumer transaction –

- (a) to do or say anything, or omit to do or say anything, if as a result a consumer might reasonably be deceived or misled;
- (b) to make a false claim;
- (c) to take advantage of a consumer if the supplier knows or ought reasonably to know that the consumer –
  - (i) is not in a position to protect his own interests; or
  - (ii) is not reasonably able to understand the character, nature, language or effect of the transaction or any matter related to the transaction; or
- (d) without limiting the generality of paragraphs (a), (b) and (c), to do anything specified in the Second Schedule.'

<sup>96</sup> Part 1 of Schedule 2 deals with specific unfair practices.

Section 4 has the same tenor as the unfairness and unconscionability provisions in Part F of the CPA.<sup>97</sup>

#### 5.3.2.3 Section 5<sup>98</sup>

Section 5 deals with circumstances surrounding unfair practices and provides that an unfair practice can be committed before, during, or after a consumer transaction<sup>99</sup> and can be a single act or omission.<sup>100</sup> Section 5 also provides that the reasonableness<sup>101</sup> of the actions of the person<sup>102</sup> must be considered, and extends liability for the act or omission<sup>103</sup> to acts or omissions performed by an agent or employee. 'Act or omission' implies that the provisions of section 5(2) of the CPFTA are pro-active and sanction omissions. Therefore, the supplier must act pro-actively to prevent liability in terms of section 5(2) of the CPFTA. Section 5(3)(b) also provides for the vicarious liability of the employer or principal of an employee or agent.<sup>104</sup>

#### 5.3.2.4 Remedies in respect of unfair practice

Section 7(4) of the CPFTA provides that 'without prejudice to any other powers of the court to grant relief, a court<sup>105</sup> (other than a Small Claims Tribunal)<sup>106</sup> may in any

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<sup>97</sup> Also see s 40(2) of the CPA discussed in Ch 4 para 4.3.2.2.1.

<sup>98</sup> 'Section 5 –

- (1) An unfair practice may occur before, during or after a consumer transaction.
- (2) An unfair practice may consist of a single act or omission.
- (3) In determining whether or not a person has engaged in an unfair practice –
  - (a) the reasonableness of the actions of that person in those circumstances is to be considered; and
  - (b) an act or omission by an employee or agent of a person is deemed also to be an act or omission of the person if the act or omission occurred in the course of –
    - (i) the employee's employment with the person; or
    - (ii) the agent exercising the powers or performing the duties on behalf of the person within the scope of the agent's actual or apparent authority.'

<sup>99</sup> Section 5(1) of the CPFTA. This implies that the section obliges the supplier to behave proactively.

<sup>100</sup> Section 5(2) of the CPFTA.

<sup>101</sup> Section 5(3)(a) of the CPFTA. The term 'reasonableness' is not defined in the CPFTA. Chandran *Business Law* 171 argues that reasonableness could serve as a defence for the supplier.

<sup>102</sup> The term 'person' refers to the supplier, his or her employee (s 5(3)(b)(i) of the CPFTA) or agent (s 5(3)(b)(ii) of the CPFTA).

<sup>103</sup> Section 5(1) CPFTA.

<sup>104</sup> The provisions of s 5(3)(b) of the CPFTA is similar to the position in South Africa in s 113 of the CPA.

<sup>105</sup> 'Court' is not defined in the CPFTA.

<sup>106</sup> The Small Claims Tribunal does not have jurisdiction over matters based on hire-purchase agreements, time-share contracts, or the rental or sale of immovable property. However, s 7(1) provides that the Small Claims Tribunal shall have jurisdiction to hear and determine the matters provided for in s 7(1)(a)-(e) of the CPFTA. Also see s 7(2)-(5) of the CPFTA; Loke et al *A Consumer's Guide* 36. The Small Claims Tribunal is restricted in jurisdiction based on the monetary value of the claim, currently S\$ 20 000 (R 247 000), which can be raised to S\$ 30 000

proceedings where the court finds that a supplier has engaged in an unfair practice', make the following orders:<sup>107</sup>

- order restitution of money, property, or other consideration provided by the consumer;
- award damages for any loss the consumer suffered as a result of the unfair practice;
- make an order for specific performance against the supplier;
- direct the supplier to repair goods, or provide parts for goods; or
- make an order to vary the contract terms.

In addition, the court may require a supplier who has not complied with the provisions of the CPFTA, to publish the fact that there is an injunction against it – a so-called 'name-and-shame' tactic – to ensure that suppliers adhere to the requirements of the CPFTA.<sup>108</sup> The errant supplier must inform the Commission of certain prescribed matters to keep the Commission updated and to allow it to ensure compliance with the relevant order.<sup>109</sup> This measure ensures the continued supervision over errant suppliers, and continued protection of consumers.<sup>110</sup> The Commission, in these circumstances, provides a supervisory compliance function, in addition to, and as a consequence of, the court order. This strengthens and ensures continued enforcement of both consumer redress and enforcement measures to effect better implementation of the protective measures in the CPFTA.

In addition, the consumer has the right to cancel the agreement in terms of certain sections of the CPFTA when the 'cooling-off' period applies – eg, in time-share

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(approximately R 370 000 on 18 June 2020) if both parties agree. See [https://www.statecourts.gov.sg/cws/SmallClaims/Pages/GeneralInformation.aspx#:~:text=Jurisdiction of the Tribunals, it%20within%20the%20Tribunals'%20jurisdiction.](https://www.statecourts.gov.sg/cws/SmallClaims/Pages/GeneralInformation.aspx#:~:text=Jurisdiction%20of%20the%20Tribunals,it%20within%20the%20Tribunals'%20jurisdiction.) (date of use 15 June 2020).

<sup>107</sup> Chandran *Business Law* 172; Loke et al *A Consumer's Guide* 35-36.

<sup>108</sup> Section 9(5)(b) CPFTA.

<sup>109</sup> Amended by Act 25 of 2016 Consumer Protection (Fair Trading) (Amendment) Act 2016. See s 9 CPFTA; Meng [https://www-lawnet-sg.libproxy1.nus.edu.sg/lawnet/group/lawnet/page-content?p\\_p\\_id=legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet&p\\_p\\_lifecycle=2&p\\_p\\_state=normal&p\\_p\\_mode=view&p\\_p\\_resource\\_id=viewPDFSourceDocument&p\\_p\\_cacheability=cacheLevelPage&p\\_p\\_col\\_id=column-2&p\\_p\\_col\\_count=1&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_documentID=%2FCommentaries%2F96037.xml&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportletloadPage=0&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_prevPage=-1&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_nextPage=1&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_viewType=&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_contentDocID=%2FCommentaries%2F96037.xml&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_queryStr=%28SPRING+appointed+administering+agency%29&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_implicitModel=true&pdfFileName=96037.pdf&pdfFileUri=/Commentaries/96037/resource/96037.pdf](https://www-lawnet-sg.libproxy1.nus.edu.sg/lawnet/group/lawnet/page-content?p_p_id=legalresearchpagecontent_WAR_lawnet3legalresearchportlet&p_p_lifecycle=2&p_p_state=normal&p_p_mode=view&p_p_resource_id=viewPDFSourceDocument&p_p_cacheability=cacheLevelPage&p_p_col_id=column-2&p_p_col_count=1&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_documentID=%2FCommentaries%2F96037.xml&_legalresearchpagecontent_WAR_lawnet3legalresearchportletloadPage=0&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_prevPage=-1&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_nextPage=1&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_viewType=&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_contentDocID=%2FCommentaries%2F96037.xml&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_queryStr=%28SPRING+appointed+administering+agency%29&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_implicitModel=true&pdfFileName=96037.pdf&pdfFileUri=/Commentaries/96037/resource/96037.pdf) (date of use: 27 May 2019).

<sup>110</sup> Since the publication of this legal bulletin the Competition and Consumer Commission (the Commission) has been appointed as administering agent. See para 5.1 above.

contracts.<sup>111</sup> Section 12F of the CPFTA provides powers for courts in connection with the Lemon Law.<sup>112</sup>

The CPFTA also regulates time-share.

#### 5.3.2.5 *Time-share*<sup>113</sup>

The definitions of time-share accommodation, time-share contract, time-share related contract, and time-share rights in section 2(1) of the CPFTA are not unusual, and refer to rights in terms of agreements in respect of living accommodation intended to be used for leisure purposes by parties who have the right or rights to use that accommodation.<sup>114</sup> This right is conditional on the period for which the rights can be exercised being not less than three years.<sup>115</sup> A right to accommodation in terms of a contract of employment does not qualify as a time-share right or rights.<sup>116</sup> The CPFTA was amended in 2008 to provide adequate protection for time-share buyers.<sup>117</sup> The definitions of the abovementioned terms were inserted in the CPFTA

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<sup>111</sup> Chandran *Business Law* 172-173. These contracts where the so-called 'cooling-off' period applies are regulated by s 11 of the CPFTA. The types of contract to which this right applies are not listed in s 11 of the CPFTA, but are prescribed by regulation – eg, time-share contracts, see para 5.3.2.5 below. The CPA also has cooling-off periods in certain instances, see Ch 4 para 4.4.2.

<sup>112</sup> See para 5.3.2.7 below for an explanation of the term 'Lemon Law'. Part II of the CPFTA is referred to as the Lemon Law for ease of reference.

<sup>113</sup> Section 2(1) of the CPFTA provides the following definitions relevant to time-share:

"time share accommodation" means any living accommodation, in Singapore or elsewhere, used or intended to be used (wholly or partly) for leisure purposes by a class of persons all of whom have rights to use, or participate in arrangements under which they may use, that accommodation or accommodation within a pool of accommodation to which that accommodation belongs.

"time share contract" means a contract which confers or purports to confer on an individual time share rights that are exercisable during a period of not less than 3 years;

"time share related contract" means a contract to assist a consumer to dispose of his time share rights conferred under a time share contract;

"time share rights" mean rights to use time share accommodation for a specified or ascertainable period, but do not include rights under a contract of employment or an insurance policy.'

<sup>114</sup> All of these will be collectively referred to as time-share.

<sup>115</sup> See the definitions of 'time share accommodation', 'time share contract', 'time share related contract' and 'time share rights' in s 2(1) of the CPFTA. Also see Chandran *Business Rights* 164 n 33.

<sup>116</sup> See definition of 'time share rights' in s 2(1) CPFTA.

<sup>117</sup> Section 2 (g) of the Consumer Protection (Fair Trading) Amendment Act 15 of 2008. For further reading see a bulletin on the public consultation process on the proposed amendments before these amendments came into operation. The CPFTA is evaluated and measured against international legislation on a regular basis, and it was decided to amend the CPFTA to widen its scope to allow it to regulate these schemes and consumers' interests. Shiau [https://www.lawnet-sg.libproxy1.nus.edu.sg/lawnet/group/lawnet/page-content?p\\_p\\_id=legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet&p\\_p\\_lifecycle=2&p\\_p\\_state=normal&p\\_p\\_mode=view&p\\_p\\_resource\\_id=viewPDFSourceDocument&p\\_p\\_cacheability=cacheLevelPage&p\\_p\\_col\\_id=column-2&p\\_p\\_col\\_count=1&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_documentID=%2FCommentaries%2F50333-](https://www.lawnet-sg.libproxy1.nus.edu.sg/lawnet/group/lawnet/page-content?p_p_id=legalresearchpagecontent_WAR_lawnet3legalresearchportlet&p_p_lifecycle=2&p_p_state=normal&p_p_mode=view&p_p_resource_id=viewPDFSourceDocument&p_p_cacheability=cacheLevelPage&p_p_col_id=column-2&p_p_col_count=1&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_documentID=%2FCommentaries%2F50333-)

to include time-share purchasers under the protection offered to consumers by the CPFTA.

This amendment was implemented by way of the CPFTA (Cancellation of Contracts) Regulations 2009.<sup>118</sup> These regulations contain definitions of cancellation periods, notices to consumers, long-term holiday products, cancellation notices, and other relevant terms.<sup>119</sup> The most important definition is that of a 'regulated contract', which means 'a direct sales contract, a long-term holiday product contract, a time share contract or a time share related contract'.<sup>120</sup>

Regulation 4(2) provides that a consumer may give notice of cancellation of the time-share agreement at any time within the cancellation period, or the extended cancellation period, where applicable. The cancellation period in terms of the regulations for time-share products is a period of five days (excluding weekends and public holidays) after the contract is entered into,<sup>121</sup> or five days after the consumer information notice has been brought to the attention of the consumer.<sup>122</sup> The supplier is not entitled to claim payments or other consideration before the expiry of the cancellation period.<sup>123</sup> In other words, the cancellation period is essentially a 'cooling-off' period.<sup>124</sup>

Notice of cancellation may be given in a prescribed form,<sup>125</sup> or by any other notice in writing.<sup>126</sup> Should the consumer not cancel the contract within five days, he or she loses the right to cancel the agreement. When a supplier refuses to accept

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<sup>118</sup> Hereafter the CC Regulations which came into operation on 15 April 2009.

<sup>119</sup> See <https://www.mti.gov.sg/Legislation/Legislation/Consumer-Protection> (date of use: 14 November 2019).

<sup>120</sup> See the definitions in reg 2(1) for more information. The regulations also provide for the exercise of the powers in s 11 which deals with the cooling-off periods and s 18A which provides that the burden of proof in consumer disputes rests on the supplier.

<sup>121</sup> Reg 4(2) of the CC Regulations.

<sup>122</sup> Reg 4(1) of the CC Regulations.

<sup>123</sup> Reg 3A CC Regulations.

<sup>124</sup> Cooling-off in Singaporean law is discussed by Loke et al *A Consumer's Guide* 21-22.

<sup>125</sup> Reg 4(7) CC Regulations.

<sup>126</sup> The consumer can give notice of cancellation by using the form prescribed in the CC Regulations and by delivering it personally, sending it by pre-paid post, or sending it via facsimile. For more information see <https://www.mti.gov.sg/Legislation/Legislation/Consumer-Protection> (date of use: 14 November 2019) and Loke et al *A Consumer's Guide* 22-23.

cancellation, the consumer can lodge a complaint with the CASE.<sup>127</sup> All monies paid by the consumer must be refunded within 60 days of cancellation.<sup>128</sup>

Although the legislature's policy to uphold the maxim *caveat emptor*<sup>129</sup> is tempered when it comes to time-share, after the cooling-off period the consumer is bound by the agreement. This position is similar to the position in South Africa,<sup>130</sup> but differs from the position in the UK which is more beneficial to the consumer.<sup>131</sup>

#### 5.3.2.6 Other consumer protection provisions

Section 13 prohibits the contractual exclusion of provisions of the CPFTA, except in settlement of a dispute. This prohibition is similar to section 51 of the CPA.<sup>132</sup>

Section 15 provides that despite any provision in the CPFTA, consumers retain all rights and remedies in terms of other legislation or common-law rights, subject to the provisions in section 11 – which provides for regulations regarding cancellation rights – and section 20 – which provides that the Minister may from time to time make regulations necessary or expedient for the purposes of the CPFTA. At first glance, section 15 appears similar to section 2(10) of the CPA. However, section 2(10) is more restrictive in that it applies only to provisions of the CPA,<sup>133</sup> not to agreements entered into, which, unless specifically otherwise provided by legislation, are entered into and regulated by the common law.<sup>134</sup>

#### 5.3.2.7 The 'Lemon Law'<sup>135</sup>

In 2012, the so-called 'Lemon Law' was added to the Act as Part III.<sup>136</sup> The Lemon Law provides the consumer with remedies to replace products, or be refunded the

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<sup>127</sup> For a discussion of the powers and authority of the CASE, see para 5.1 above.

<sup>128</sup> For a discussion of the consumer's right to cancel see <https://singaporelegaladvice.com/law-articles/unfair-sale-practices-cooling-periods-right-cancel-contracts-consumer-protection-fair-trading-act/> (date of use: 14 November 2019).

<sup>129</sup> Parliamentary Debate on 10 November 2003 available at <https://sprs.parl.gov.sg/search/report?sittingdate=10-11-2003> (date of use: 29 May 2020).

<sup>130</sup> See Ch 4 para 4.2.3.9.

<sup>131</sup> See the discussion of this aspect in Ch 6 para 6.4.

<sup>132</sup> See Ch 4 para 4.3.2.3.3.

<sup>133</sup> See Ch 4 para 4.2.4.

<sup>134</sup> See Ch 4 para 4.2.4.

<sup>135</sup> See para 5.3.1 above. See the discussion of the term 'Lemon Law' in Loke (2014) *SJLS* 285-286. See also Lau <http://learn.asialawnetwork.com/2017/12/05/a-guide-to-singapores-lemon-law-the-law-protecting-consumers-in-singapore/> (date of use: 25 April 2019). The provisions in Part III of the CPFTA are referred to as the 'Lemon Law' for ease of reference. As consumer rights in respect of non-conforming goods do not form part of the focus of this thesis, I will only highlight a few pertinent aspects.

<sup>136</sup> See Part III of the CPFTA.



purchase price (or part thereof), in the event of defective goods, when replacement or repair of the goods has been unsuccessful.<sup>137</sup>

Under the Lemon Law, if at the time of delivery the goods delivered (but not services as the Lemon Law only applies to goods)<sup>138</sup> do not correspond to what is described in the relevant contract, or as regards the quality thereof, the consumer is entitled<sup>139</sup> to require the transferor (not the supplier)<sup>140</sup> to repair or replace the goods.<sup>141</sup> Alternatively, the consumer can require the transferor to reduce the purchase price by an appropriate amount<sup>142</sup> or to rescind the agreement.<sup>143</sup> If the transferor discloses a defect, or if the defect was or would have been easy to see during a proper inspection by the consumer, the consumer will not be able to base his or her claim on the Lemon Law.

The scope of certain definitions in the CPFTA is widened in section 12A for purposes of the Lemon Law, and do not correspond fully to the definitions in the rest of the CPFTA. For instance, the definition of transferee is not exactly the same as the definition of consumer in the rest of the CPFTA. This aspect can be criticised as

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<sup>137</sup> There are different views on the origin of the term Lemon Law. Some writers view it as British slang for substandard goods, while others allege it is an American term used in connection with the sale of second-hand motor vehicles. Loke (2014) *SJLS* 285 n 3 and 286 n 4. See the Parliament Report Parliament No 12 Session No 1 Volume 88 Sitting no 23 date 9 March 2012 Second reading of the Bill available at [https://www.lawnet-sg.libproxy1.nus.edu.sg/lawnet/group/lawnet/page-content?p\\_p\\_id=legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet&p\\_p\\_lifecycle=1&p\\_p\\_state=normal&p\\_p\\_mode=view&p\\_p\\_col\\_id=column-2&p\\_p\\_col\\_count=1&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_action=openContentPage&contentDocID=/SPRS/0070\\_88\\_23\\_bill-5.xml&queryStr=\(Lemon%20Law\)](https://www.lawnet-sg.libproxy1.nus.edu.sg/lawnet/group/lawnet/page-content?p_p_id=legalresearchpagecontent_WAR_lawnet3legalresearchportlet&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_p_col_id=column-2&p_p_col_count=1&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_action=openContentPage&contentDocID=/SPRS/0070_88_23_bill-5.xml&queryStr=(Lemon%20Law)) (date of use: 26 May 2019); <https://www.gov.sg/factually/content/what-is-the-lemon-law> (date of use: 26 May 2019); Booyesen (2016) *SJLS* 223; Chin & Yusoff (2017) *International Business Management* 1328, 1332.

<sup>138</sup> Similar to s 56(2) of the CPA.

<sup>139</sup> Section 12C of the CPA.

<sup>140</sup> The definitions in section 12A of the CPFTA do not use the term supplier, but rather transferor which is defined as:

- (a) in relation to a contract of sale of goods, means the seller within the meaning of the Sale of Goods Act;
- (b) in relation to a contract for the transfer of goods, has the same meaning as in the Supply of Goods Act; and
- (c) in relation to a hire-purchase agreement, means the owner within the meaning of the Hire-Purchase Act.'

<sup>141</sup> Loke (2014) *SJLS* 301-303.

<sup>142</sup> Loke (2014) *SJLS* 305

<sup>143</sup> Loke (2014) *SJLS* 304-305. The Lemon Law differs from s 20 of the CPA as s 20 only entitles the consumer to return goods within 10 days of delivery of the goods, cooling-off in certain prescribed circumstances. Also see Tan <https://www.straitstimes.com/singapore/transport/majority-of-lemon-law-car-disputes-resolved> (date of use: 25 April 2019); Poh <https://blog.moneysmart.sg/shopping/lemon-law-singapore/> (date of use: 25 April 2019); Loke (2014) *SJLS* 285-306.

it could lead to differing interpretations to these two terms which could lead to confusion.<sup>144</sup>

The right to repair, replacement, reduction of the purchase price, or rescission of the contract is qualified by a time limit of six months after delivery of the goods.<sup>145</sup> However, the six months' time limit does not apply if it is established that the goods complied with the agreement on the date of delivery. The six months' time limit also does not apply<sup>146</sup> if the nature of the goods is such that they cannot last for six months – eg, perishables like vegetables and meat, or other products with an expiry date.

The Lemon Law has been criticised for being 'bolted on' to existing legislation and for being unclear for unsophisticated consumers.<sup>147</sup> The inclusion of the Lemon Law in the CPFTA also creates a more difficult dispute resolution procedure. It is submitted that the subtle differences in definitions, and the general overlap of the CPFTA and the Lemon Law can cause confusion and problems in practice.

The provisions of the Lemon Law are relevant to consumers under fixed-term contracts, for example, in terms of an agreement for the purchase (and service delivery) of a cell phone.<sup>148</sup>

Section 12A provides for the interpretation of the Lemon Law, and defines key terms. Section 12B<sup>149</sup> deals with the general application of the Lemon law. Section

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<sup>144</sup> Loke (2014) *SJLS* 28-290, 306.

<sup>145</sup> Section 12B(3) CPFTA. This is similar to s 56 of the CPA. See Ch 4 para 4.3.3.4.

<sup>146</sup> Section 12B(4) CPFTA.

<sup>147</sup> Loke (2014) *SJLS* 289-290, 306.

<sup>148</sup> A cell phone contract normally covers both the purchase and service delivery of the phone – but bear in mind the Lemon Law as it appears in the CPFTA will not apply to the service delivery part of the agreement.

<sup>149</sup> '12B. – (1) This Part applies if –

- (a) the transferee deals as consumer;
  - (b) the goods do not conform to the applicable contract at the time of delivery; and
  - (c) the contract was made on or after the date of commencement of section 6 of the Consumer Protection (Fair Trading) (Amendment) Act 2012.
- (2) If this section applies, the transferee has the right –
- (a) under and in accordance with section 12C, to require the transferor to repair or replace the goods; or
  - (b) under and in accordance with section 12D –
    - (i) to require the transferor to reduce the amount to be paid for the transfer by the transferee by an appropriate amount; or
    - (ii) to rescind the contract with regard to the goods in question.
- (3) For the purposes of subsection (1)(b), goods which do not conform to the applicable contract at any time within the period of 6 months starting after the date on which the goods were delivered to the transferee must be taken not to have so conformed at that date.
- (4) Subsection (3) does not apply if –
- (a) it is established that the goods did so conform at that date; or
  - (b) its application is incompatible with the nature of the goods or the nature of the lack of conformity.'

12B provides that the consumer (transferee<sup>150</sup> in the Lemon Law) has the right to repair or replacement, or a price reduction or rescission of the contract, when the goods do not conform to the contract at date of delivery, and that the time frame for repair or replacement is six months. In the alternative, the consumer can claim a price reduction or rescind the agreement.<sup>151</sup>

Section 12C<sup>152</sup> qualifies the repair or replacement of goods and provides that the transferor must repair or replace the goods within a reasonable time, without causing significant inconvenience to the consumer. It also requires the supplier to bear the costs of repairing or replacing the goods. If replacement is impossible or disproportionate in comparison to other remedies or a suitable reduction or rescission, the consumer will not be entitled to such repair or replacement. To establish this disproportionality the section provides for the consideration of the value of the goods, the lack of conformity, and the degree of inconvenience to the

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<sup>150</sup> The definition of transferee in s 12A of the CPFTA reads:

“transferee” –

- (a) in relation to a contract of sale of goods, means the buyer within the meaning of the Sale of Goods Act;
- (b) in relation to a contract for the transfer of goods, has the same meaning as in the Supply of Goods Act; and
- (c) in relation to a hire-purchase agreement, means the hirer within the meaning of the Hire-Purchase Act.’

<sup>151</sup> The price reduction or rescission provisions are found in s 12D. For a detailed discussion of s 12B see Loke (2014) *SJLS* 285-306.

<sup>152</sup> ‘12C.–(1) If section 12B applies, the transferee may require the transferor to –

- (a) repair the goods; or
- (b) replace the goods.
- (2) If the transferee requires the transferor to repair or replace the goods, the transferor must –
  - (a) repair or, as the case may be, replace the goods within a reasonable time and without causing significant inconvenience to the transferee; and
  - (b) bear any necessary costs incurred in doing so (including in particular the cost of any labour, materials or postage).
- (3) The transferee must not require the transferor to repair or, as the case may be, replace the goods if that remedy is –
  - (a) impossible;
  - (b) disproportionate in comparison to the other of those remedies; or
  - (c) disproportionate in comparison to an appropriate reduction in the amount to be paid for the transfer under paragraph (a), or rescission under paragraph (b), of section 12D(1).
- (4) One remedy is disproportionate in comparison to the other if the one imposes costs on the transferor which, in comparison to those imposed on him by the other, are unreasonable, taking into account –
  - (a) the value which the goods would have if they conformed to the applicable contract;
  - (b) the significance of the lack of conformity with the applicable contract; and
  - (c) whether the other remedy could be effected without causing significant inconvenience to the transferee.
- (5) Any question as to what is a reasonable time or significant inconvenience is to be determined by reference to –
  - (a) the nature of the goods; and
  - (b) the purpose for which the goods were acquired.’

consumer. The nature and purpose of the goods must also be considered when establishing a reasonable time or significant inconvenience.

Section 12D<sup>153</sup> provides that the consumer can claim a reduction in price by a proportionate amount or rescind the contract. Loke emphasises that the legislature specifically provided that replacement and repair are to be preferred over price reduction and rescission. He cautions that courts should not undermine or erode the consumer's statutory right to repair or replacement of a product by too readily ordering a reduction in price or rescission of the agreement.<sup>154</sup> This, of course, confirms the application of the principle *pacta servanda sunt*.<sup>155</sup>

Before rejecting and terminating the agreement, or requiring the replacement of the goods, the consumer must give the transferor a reasonable time to repair or replace the goods in terms of section 12E.<sup>156</sup>

Despite being criticised as an add-on measure causing confusion,<sup>157</sup> overall the Lemon Law benefits consumers in Singapore. Detailed measures, as contained in the Lemon Law, could benefit consumers in South Africa as the current measures in sections 56 to 61 of the CPA are neither as detailed, nor as sophisticated as those in the Lemon Law.<sup>158</sup>

The Lemon Law is similar to the provisions of sections 56 and 61 of the CPA,<sup>159</sup> in that both aim to regulate the return of goods that do not comply with the description and or standard of goods in the agreement, or the warranty as to their quality. These latter sections deal with replacement, repair, or refund in respect of the goods to the

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<sup>153</sup> 12D.– (1) If section 12B applies, the transferee may –  
    (a) require the transferor to reduce the amount to be paid for the transfer of the goods in question to the transferee by an appropriate amount; or  
    (b) rescind the contract with regard to those goods, if the condition in subsection (2) is satisfied.  
(2) The condition is that –  
    (a) by virtue of section 12C(3) the transferee may require neither repair nor replacement of the goods; or  
    (b) the transferee has required the transferor to repair or replace the goods, but the transferor is in breach of the requirement of section 12C(2)(a) to do so within a reasonable time and without causing significant inconvenience to the transferee.  
(3) For the purposes of this Part, if the transferee rescinds the contract, any reimbursement to the transferee may be reduced to take account of the use he has had of the goods since they were delivered to him.'

<sup>154</sup> See Loke (2014) *SJLS* 305.

<sup>155</sup> Also, see the discussion of this aspect in Ch 2 para 2.4; Ch 3 para 3.2.2; and Ch 4 para 4.2.3.7.11.

<sup>156</sup> Section 12E of Part III of the CPFTA.

<sup>157</sup> Loke (2014) *SJLS* 306

<sup>158</sup> See ss 56-61 of the CPA, and the discussion in Ch 4 para 4.3.3.4.

<sup>159</sup> For a detailed critical discussion of s 61 of the CPA see Tennant *LLD*.

consumer.<sup>160</sup> While the CPA contains a similar provision in section 56(2), the extent of detailed protection offered by the CPFTA is superior to that of the CPA.<sup>161</sup>

The remedies, powers, and orders in Singapore as regards 'Lemon Law' matters, are more explicitly described, wider, and more effective than those available to the consumer under section 14 of the CPA which details no specific remedies or orders in section 14 itself, or in sections of the CPA relevant to section 14, to protect the consumer in circumstances such as non-delivery or material default by the supplier of the goods under a fixed-term agreement.<sup>162</sup>

#### *5.3.2.8 Time limit for institution of action*

The consumer must institute action within the period prescribed in section 12(1) of the CPFTA, which in general is two years after the occurrence date of the event on which the claim is based.<sup>163</sup>

I briefly consider procedural matters next, before highlighting a few pertinent aspects of jurisdiction, the powers of courts, and the enforcement of the CPFTA by the Commission.

#### *5.3.2.9 Procedural matters*

The Singapore legal system is based on English law and many of the procedures are similar to those in South Africa. What follows is a brief analysis of the procedural issues that affect the functioning of the CPFTA.

##### *5.3.2.9.1 Parol evidence*

Section 17<sup>164</sup> of the CPFTA deals with the parol evidence rule.<sup>165</sup> It expressly allows evidence regarding express warranties in consumer law actions, even though they

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<sup>160</sup> Note that s 56 of the CPA deals with goods only, and not services. Note that the CPA also has provisions dealing with product liability, see the discussion in Ch 4 para 4.3.3.4.

<sup>161</sup> The section in the CPA could disadvantage the supplier or the consumer unreasonably as unlike its counterpart in the CPFTA, the section does not provide for disproportionality or inconvenience to be taken into account.

<sup>162</sup> See the discussion in Ch 4 para 4.2.3.7.

<sup>163</sup> For exceptions see s 12.

<sup>164</sup> 'Section 17.– (1) Notwithstanding sections 93 and 94 of the Evidence Act (Cap. 97), parol or extrinsic evidence establishing the existence of an express warranty is admissible in any action relating to a consumer transaction between a consumer and a supplier even though it adds to, varies or contradicts a written contract.  
(2) Subsection (1) shall not be applicable to establish the existence of any express warranty in respect of goods or services intended for business use.'

<sup>165</sup> For a discussion of parol evidence see Ch 3 para 3.2.9; Ch 4 para 4.3.2.7, and Ch 6 para 6.3.6. The rule is abolished in certain sections of the CPFTA despite the provisions of ss 93 and 94 of the Evidence Act (Cap 97) of Singapore.

may vary or contradict any written agreement between the parties.<sup>166</sup> This is an advantage of the CPFTA, not only because it provides clarity on the contentious issue of parol evidence,<sup>167</sup> but it also assists the court when interpreting express warranties in an agreement, in particular in instances of unequal bargaining positions, unfairness, and unconscionability, and when vulnerable consumers are concerned.<sup>168</sup>

Section 17 appears to abolish the parol evidence rule in respect of express warranties only. However, when section 5(3)(a)<sup>169</sup> of the CPFTA is interpreted, the parol evidence rule is, by implication, abolished in most if not all consumer complaints. Section 5(3)(a) of the CPFTA aims to determine the reasonableness of a person's actions to establish whether an unfair practice occurred before, during, or after a consumer transaction.<sup>170</sup> When case law is studied, it is clear that all extrinsic evidence, including parol evidence, is taken into account by courts when adjudicating consumer law issues.<sup>171</sup>

In South Africa, similar but less extensive exclusions of the parol evidence rule exist. The parol evidence rule is excluded in the circumstances provided for in section 4(4)(b)(iii) of the CPA where a court or tribunal must interpret a standard form, a contract, or other document prepared by, or on behalf of the supplier to advance the purposes and policies of the CPA.<sup>172</sup> In addition, sections 48 and 52(2) of the CPA provide that extrinsic evidence may be led to establish whether terms are unfair, unjust, or unreasonable.<sup>173</sup> The exclusion of the parol evidence rule is to be preferred as this greatly assists consumers who are in a weaker bargaining position.

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<sup>166</sup> Note that s 17(2) specifically excludes express warranties for goods or services used for business purposes. Some writers contend that the parol evidence rule has been abolished for purposes of the CPFTA, see Tan [https://www-lawnet-sg.libproxy1.nus.edu.sg/lawnet/group/lawnet/page-content?p\\_p\\_id=legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet&p\\_p\\_lifecycle=1&p\\_p\\_state=normal&p\\_p\\_mode=view&p\\_p\\_col\\_id=column-2&p\\_p\\_col\\_count=1&legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_action=openContentPage&contentDocID=/Commentaries/45879-M.xml&queryStr=\(Consumer%20protection%20fair%20trading%20act%20Singapore\)](https://www-lawnet-sg.libproxy1.nus.edu.sg/lawnet/group/lawnet/page-content?p_p_id=legalresearchpagecontent_WAR_lawnet3legalresearchportlet&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_p_col_id=column-2&p_p_col_count=1&legalresearchpagecontent_WAR_lawnet3legalresearchportlet_action=openContentPage&contentDocID=/Commentaries/45879-M.xml&queryStr=(Consumer%20protection%20fair%20trading%20act%20Singapore)) (date of use: 27 May 2019). However, the CPFTA does not abolish the parol evidence rule, it is only excluded expressly or by implication in certain provisions or circumstances.

<sup>167</sup> See Ch 3 para 3.2.9 for a general discussion of the parol evidence rule.

<sup>168</sup> Section 4(c) CPFTA, s 3(1)(b) CPA. Also, see the case of *Chwee Kin Keong and Others v Digilandmall.com Pte Ltd* [2004] 2 SLR (R) 594. Although this is the reference to the High Court case, this case illustrates the extent to which the court used parol evidence. The order of the High Court was appealed, but the High Court decision was confirmed on appeal.

<sup>169</sup> The heading of s 5 is 'Circumstances surrounding unfair practice'. Section 5(3) reads: 'In determining whether or not a person has engaged in an unfair practice (a) the reasonableness of the actions of that person in those circumstances is to be considered;'.<sup>170</sup>

<sup>170</sup> On the interaction between the sanctity of contract, and the consideration of fairness see Kwek (2005) *SAC LJ* 411-425.

<sup>171</sup> See, eg, the *Chwee* judgment para 5.5.3 below.

<sup>172</sup> See Ch 4 paras 4.2.3.3 and 4.3.2.7.

<sup>173</sup> See Ch 4 para 4.3.2.7.

#### 5.3.2.9.2 *Presumption against the supplier*

Section 18 of the CPFTA provides that all written consumer agreements in which there is an ambiguous provision must be interpreted against the supplier.<sup>174</sup> Both sections 17 – which abolishes the parol evidence rule in respect of express warranties – and section 18 of the CPFTA ease the role of the court when interpreting and investigating consumer agreements, as will be illustrated when discussing case law in Singapore.<sup>175</sup>

Section 18 creates a presumption against a supplier in Singapore when a document is ambiguous. In its effect, therefore, it is similar to sections 4(3) and 2(9) of the CPA which also deal with ambiguity and advantage to the consumer.<sup>176</sup> Section 4(3) of the CPA is wider than section 18 of the CPFTA as it applies to the interpretation of any provision of the CPA, and not only to the interpretation of consumer agreements. Section 4(3) of the CPA also expressly includes the promotion of the spirit and purposes of the CPA when interpreting the CPA, and not merely the benefit of the consumer as in the CPFTA, which should also considerably widen the scope of interpretation compared to the CPFTA in Singapore.

#### 5.3.2.9.3 *Defences*

The reasonableness of a supplier's conduct will be evaluated to determine if he or she has engaged in an unfair practice in terms of section 5(3) of the CPFTA. If the conduct was based on a reasonable belief, for instance on a representation made by the manufacturer, this belief could serve as a valid defence.<sup>177</sup> A similar provision in the CPA is found in section 52(2)(d) which provides that both the supplier and the consumer's conduct must be considered by the court when deciding on fair and just conduct and terms and conditions.

#### 5.3.2.9.4 *Burden of proof*

When a consumer lodges a complaint, section 18A provides the burden of proof rests with the supplier to show that he or she has complied with all relevant provisions of the CPFTA and its regulations.<sup>178</sup> This benefits consumers in Singapore, who are not necessarily sufficiently informed about all the provisions of the CPFTA, and perhaps overawed by legal representatives of suppliers during

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<sup>174</sup> Similar to s 4(4) of the CPA. This is the *contra proferentem* rule, see Ch 2 para 2.5.4; Ch 4 para 4.2.3.3; and Ch 6 para 6.3.4.3.

<sup>175</sup> See, eg, the *Chwee* judgment para 5.5.3 and *Freely v Ong* para 5.5.1 below for examples of good investigative adjudication. Although the court did not find against the supplier in the *Chwee* judgment, an in-depth investigation was held and the court came to the correct decision.

<sup>176</sup> See Ch 4 paras 4.2.3.3 and 4.3.6.

<sup>177</sup> Section 5(3) CPFTA; Chandran *Business Law* 171.

<sup>178</sup> See s 18A of the CPFTA. Note that the Minister is authorised to specify requirements for the CPFTA or the regulations. See also reg 9 of the CC Regulations concerning time-share products which contain a similar provision.

redress procedures. In addition, it ensures that the process is informal and consumer friendly.

These provisions dealing with the burden of proof in Singapore are progressive. The National Consumer Tribunal in South Africa, for example, has very strict formal procedures that could intimidate consumers.<sup>179</sup> A general provision in the CPA shifting the burden of proof to the supplier would greatly benefit the consumer in general, including consumers under fixed-term agreements.

#### 5.3.2.9.5 *Procedure for settlement of a dispute*

The normal procedure when a consumer feels he or she has a claim against a supplier is to:<sup>180</sup>

- try and settle the dispute with the supplier informally;
- when the dispute is not settled informally or when the consumer is not satisfied with the outcome, he or she may lodge a complaint with the CASE – the consumer must then follow the advice and procedure proposed by CASE;<sup>181</sup>
- the consumer must use a dispute-resolution scheme for disputes that fall in a class of disputes for which a prescribed resolution scheme exists;<sup>182</sup>
- the consumer can also choose to use ADR;
- if the consumer is not satisfied with the outcome of the procedures above, he or she can institute action in a court having jurisdiction;<sup>183</sup> and
- if the consumer is not satisfied with the decision of the court, he or she can appeal this decision to a further court that has jurisdiction.

These steps correspond to the position under the CPA as the consumer must follow a set procedure before going to court. However, the procedures and enforcement of the CPFTA, and the efficiency of these measures in Singapore, appear more effective and better organised than in South Africa<sup>184</sup> – which, of course, greatly assists the consumer.

#### 5.3.2.10 *Jurisdiction, powers and enforcement*

Section 7 provides for the jurisdiction of the small claims tribunals<sup>185</sup> and for specific orders that courts can make when a consumer bases his or her claim on an unfair

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<sup>179</sup> Woker (2019) *Stell LR* 108-109.

<sup>180</sup> Loke et al *A Consumer's Guide* 36-37.

<sup>181</sup> This is regarded as non-legal advice.

<sup>182</sup> See the definition of 'specified dispute resolution scheme' in s 2(1) of the CPFTA.

<sup>183</sup> Either the Small Claims Tribunal, Magistrates Court, High Court, or Appeal Court.

<sup>184</sup> See Ch 4 para 4.3.7.

<sup>185</sup> The jurisdiction of the Small Claims Tribunals is limited and set out in s 7 of the CPFTA.



practice by the supplier.<sup>186</sup> Section 7(6) excludes relief where contracts were entered into for goods or services intended for business use.

The monetary value of claims in terms of the CPFTA are limited by its section 6(6), which is regrettable as a higher amount could have ensured wider application and use of the provisions of the Act.<sup>187</sup>

Courts may require a supplier who has not complied with the provisions of the CPFTA, to publish the fact that there is an injunction against it – a so-called ‘name-and-shame’ tactic – to ensure that suppliers comply with the requirements of the CPFTA.<sup>188</sup> An errant supplier must inform the Commission of certain prescribed matters to keep the Commission updated and to allow it to ensure compliance with the relevant order.<sup>189</sup> This measure ensures continued supervision over errant suppliers, and continued protection of consumers. In these circumstances, the Commission fulfils a supervisory, compliance function, in addition to and as a consequence of the court order. This strengthens and ensures continued enforcement of both consumer redress and enforcement measures to effect better implementation of the protective measures under the CPFTA.

As mentioned in the introduction,<sup>190</sup> the Commission is responsible for the administration and enforcement of the CPFTA.<sup>191</sup> An important recent development

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<sup>186</sup> Section 7(4) of the CPFTA.

<sup>187</sup> See para 5.3.2.1.3 above.

<sup>188</sup> Section 9(5)(b) CPFTA.

<sup>189</sup> Amended by Act 25 of 2016 Consumer Protection (Fair Trading) (Amendment) Act 2016. See s 9 CPFTA; Meng [https://www-lawnet-sg.libproxy1.nus.edu.sg/lawnet/group/lawnet/page-content?p\\_p\\_id=legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet&p\\_p\\_lifecycle=2&p\\_p\\_state=normal&p\\_p\\_mode=view&p\\_p\\_resource\\_id=viewPDFSourceDocument&p\\_p\\_cacheability=cacheLevelPage&p\\_p\\_col\\_id=column-2&p\\_p\\_col\\_count=1&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_documentID=%2FCommentaries%2F96037.xml&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_loadPage=0&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_prevPage=1&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_nextPage=1&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_viewType=&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_contentDocID=%2FCommentaries%2F96037.xml&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_queryStr=%28SPRING+appointed+administering+agency%29&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_implicitModel=true&pdfFileName=96037.pdf&pdfFileUri=/Commentaries/96037/resource/96037.pdf](https://www-lawnet-sg.libproxy1.nus.edu.sg/lawnet/group/lawnet/page-content?p_p_id=legalresearchpagecontent_WAR_lawnet3legalresearchportlet&p_p_lifecycle=2&p_p_state=normal&p_p_mode=view&p_p_resource_id=viewPDFSourceDocument&p_p_cacheability=cacheLevelPage&p_p_col_id=column-2&p_p_col_count=1&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_documentID=%2FCommentaries%2F96037.xml&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_loadPage=0&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_prevPage=1&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_nextPage=1&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_viewType=&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_contentDocID=%2FCommentaries%2F96037.xml&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_queryStr=%28SPRING+appointed+administering+agency%29&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_implicitModel=true&pdfFileName=96037.pdf&pdfFileUri=/Commentaries/96037/resource/96037.pdf) (date of use: 27 May 2019). (Since the publication of this legal bulletin the Competition and Consumer Commission (the Commission) has been appointed as administering agent.)

<sup>190</sup> See para 5.1 above.

<sup>191</sup> Chia & Vijakumar [https://www-lawnet-sg.libproxy1.nus.edu.sg/lawnet/group/lawnet/pagecontent?p\\_p\\_id=legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet&p\\_p\\_lifecycle=1&p\\_p\\_state=normal&p\\_p\\_mode=view&p\\_p\\_col\\_id=column-2&p\\_p\\_col\\_count=1&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_action=openContentPage&contentDocID=/Commentaries/100134.xml&queryStr=\(Consumer%20protection%20Fair%20trading%20Act\)%20AND%20\(Caveat%20Emptor\)](https://www-lawnet-sg.libproxy1.nus.edu.sg/lawnet/group/lawnet/pagecontent?p_p_id=legalresearchpagecontent_WAR_lawnet3legalresearchportlet&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_p_col_id=column-2&p_p_col_count=1&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_action=openContentPage&contentDocID=/Commentaries/100134.xml&queryStr=(Consumer%20protection%20Fair%20trading%20Act)%20AND%20(Caveat%20Emptor)) (date of use: 27 May 2019). Prior to that the CPFTA was administered by SPRING, see [https://www.case.org.sg/consumer\\_guides\\_cpfta.aspx](https://www.case.org.sg/consumer_guides_cpfta.aspx) (date of use: 7 May 2019); Meng see n 189. (However, the Standards Productivity and Innovation Board Act was repealed in 2018.)

is that the Commission now has extensive powers to initiate an investigation if it has reasonable grounds for suspecting that a supplier is engaged in an unfair practice.<sup>192</sup> This is commendable, as it ensures that the Commission can act proactively, thereby preventing potential consumer abuses before they take place, and before complaints have been made. Previously, the CPFTA only allowed complaint-based investigations which was a problem, particularly in the absence of criminal sanctions for offenders.<sup>193</sup> The advantages of proactive consumer-protection legislative measures are well documented, the most important of which is to prevent consumer disadvantage before it happens, and to curtail suppliers from imposing unfair practices and contract terms.<sup>194</sup> An additional advantage is that consumers no longer need to seek redress in that this proactive measure eliminates the problems before they arise. This, in turn, relieves pressure on enforcement agencies and courts and saves consumers time and money in unnecessary complaint procedures and litigation.<sup>195</sup>

Although the South African Commission has similar proactive powers – for instance sections 99(d)–(h) of the CPA – these powers are seldom used, presumably owing to a lack of resources.<sup>196</sup>

The absence of criminal sanctions in the CPFTA has been criticised.<sup>197</sup> While this criticism is valid, there is merit in the legislature's argument that criminal sanctions would escalate the costs of administering and applying the legislation. The contrary view is that if perpetrators are effectively deterred from transgressing the provisions of the CPFTA by criminal sanction, no significant costs should arise as there will be no, or limited criminal prosecutions.

The process of consumer redress and the enforcement of consumer protection measures in Singapore appear better organised and more efficient, time-wise, than

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<sup>192</sup> See ss 12G–12V CPFTA.

<sup>193</sup> Section 12G–12V of the CPFTA extended the powers of the Commission to include investigative powers by way of Act 25 of 2016 on 9 December 2016. Chia & Vijakumar [https://www-lawnet-sg.libproxy1.nus.edu.sg/lawnet/group/lawnet/page-content?p\\_p\\_id=legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet&p\\_p\\_lifecycle=1&p\\_p\\_state=normal&p\\_p\\_mode=view&p\\_p\\_col\\_id=column-2&p\\_p\\_col\\_count=1&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_action=openContentPage&contentDocID=/Commentaries/100134.xml&queryStr=\(Consumer%20protection%20Fair%20trading%20Act\)%20AND%20\(Caveat%20Emptor\)](https://www-lawnet-sg.libproxy1.nus.edu.sg/lawnet/group/lawnet/page-content?p_p_id=legalresearchpagecontent_WAR_lawnet3legalresearchportlet&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_p_col_id=column-2&p_p_col_count=1&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_action=openContentPage&contentDocID=/Commentaries/100134.xml&queryStr=(Consumer%20protection%20Fair%20trading%20Act)%20AND%20(Caveat%20Emptor)) (date of use: 27 May 2019). This position was previously criticised by Booysen (2016) *SJLS* 227.

<sup>194</sup> Naudé (2007) *SALJ* 515-547; Naudé (2006) *Stell LR* 361.

<sup>195</sup> Naudé (2017) *TSAR* 141, 148; Naudé (2007) *SALJ* 521, 527; Naudé (2006) *Stell LR* 361-385; Jacobs et al (2010) *PELJ* 362.

<sup>196</sup> Naudé (2018) *JCP* 413; Woker (2019) *Stell LR* 107-109.

<sup>197</sup> Loo & Ong (2017) *University of Tasmania Law Review* 15. This aspect has not been amended since the CPFTA came into operation, and Loo and Ong regard the failure to address it as a 'missed opportunity'. The Minister expressly stated during the parliamentary debate that the legislature did not intend to criminalise offences as it would lead to an increase in costs that would ultimately be passed on to the consumer. Parliamentary Debate Parliament on 10 November 2003 available at <https://sprs.parl.gov.sg/search/report?sittingdate=10-11-2003> (date of use: 29 May 2020).

in South Africa.<sup>198</sup> A similar redress and enforcement structure, and effective statutory bodies ensuring continued adherence to the provisions of the CPA and court orders, could greatly assist consumers in general, and in fixed-term contracts in particular.<sup>199</sup>

### 5.3.3 Concluding remarks: The CPFTA

The CPFTA is principle based and has a deceptively simple aim. There is no provision in the CPFTA comparable to section 14 of the CPA which regulates fixed-term contracts. However, an examination of academic writings and court judgments revealed no disputes based on this aspect. This can only lead to the conclusion that such a provision is not regarded as necessary in Singapore in that the CPFTA and contracts concluded under its auspices are adequately regulated.

The common-law maxims *caveat emptor*<sup>200</sup> and *pacta servanda sunt*<sup>201</sup> also appear to be more widely applied in Singapore than in South Africa.<sup>202</sup> Fairness measures in the CPFTA are effective, especially with the inclusion of the Lemon Law which contributes towards this well-balanced consumer protection law regime.<sup>203</sup>

Before considering selected judgments to illustrate the application of the consumer-law regime in Singapore, brief mention of relevant aspects of the Unfair Contract Terms Act is necessary.

## 5.4 The Unfair Contract Terms Act

The Unfair Contract Terms Act<sup>204</sup> has as its purpose, 'to impose further limits on the extent to which civil liability for breach of contract, or for negligence or other breach of duty, can be avoided by means of contract terms or otherwise'.<sup>205</sup> The UCTA therefore aims to negate the detrimental effect of exemption clauses in consumer agreements,<sup>206</sup> although its application is not strictly limited to the field of consumer

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<sup>198</sup> For an analysis and critique of the consumer protection enforcement regime in South Africa, see Scott *LLD* 184-204. Also see Ch 4 para 4.3.7.

<sup>199</sup> For criticism of the South African CPA enforcement and redress procedures, see Naudé (2009) *SALJ* 515-547; Mupangavanho (2012) *PELJ* 320-341; Koekemoer (2017) *JCP* 419-443; Woker (2017) *SA Merc LJ* 1-16; Naudé (2010) *SALJ* 515-547; Van Heerden & Barnard (2011) *JICLT* 131-144; Naudé & Barnard *Enforcement* 565-590. Also see Ch 4 para 4.3.7 and for the position in the UK see Ch 6 para 6.5.5.

<sup>200</sup> See para 5.3.1 above.

<sup>201</sup> See para 5.3.2.7 above.

<sup>202</sup> See Ch 4 para 4.2.3.7.

<sup>203</sup> See paras 5.3.2.2 and 5.3.2.3 above.

<sup>204</sup> Hereafter the UCTA, came into effect on 12 November 1993 by the Application of English Law Act (Cap 7A).

<sup>205</sup> Preamble to the Act.

<sup>206</sup> Kian & Chim *Your Rights as a Consumer* 56.

law.<sup>207</sup> Only the provisions of the UCTA relevant to fixed-term agreements are highlighted.

The UCTA aims to protect consumers who have entered an agreement with a supplier or business, against the exclusion of certain rights when the consumer is in a weaker bargaining position.<sup>208</sup> A disadvantage of the UCTA is that it is not always possible to identify clauses that exclude or restrict the liability of suppliers, and some authors argue for reform of the UCTA to enable courts to consider freely the allocation of the risks involved in agreements.<sup>209</sup>

At first glance, the protection of the UCTA only applies to individual consumers and does not extend to businesses or companies as neither of these terms is clearly defined in the Act.<sup>210</sup> When section 12(1)(a) of the Act is read, it appears that a business cannot deal as a consumer if it enters into the agreement in the course of business.<sup>211</sup> Loke contends that a business can be regarded as a consumer for purposes of the UCTA,<sup>212</sup> but he bases this argument on foreign case law. However, *Kay Lim Construction & Trading Pte Ltd v Soon Douglas (Pte) Ltd and Another*<sup>213</sup> had already been decided when Loke's article was published. In *Kay Lim*, the court ruled that section 3(1) of the UCTA indeed protects businesses.<sup>214</sup> Latimer supports

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<sup>207</sup> As certain aspects of the UCTA apply whether it is a consumer sales agreement or not. This is not an express provision, but is implied in s 12 of the Sale of Goods Act. Kian & Chim *Your Rights as a Consumer* 56; Booysen (2016) *SJLS* 219, 228. Section 2 covers all contracts. Section 3(1) uses the words, 'deals as consumer or on the other's written standard terms of businesses'. In addition, s 6(3) provides that the Act can be applied if reasonable against persons other than consumers as well. Section 7(3) further extends the scope of the UCTA to other parties than consumers, also as far as it is reasonable.

<sup>208</sup> It should be noted that despite the effect and scope of the UCTA – s 15 of the CPFTA provides similar protection to consumers as s 2(10) of the CPA. See the discussion in Ch 4 para 4.2.4. For case law dealing with the scope of the UCTA, see *Koh Lin Yee v Terrestrial Pte Ltd and another* [2015] 2 SLR 497. This case dealt, amongst others, with whether the exclusion of a set-off of payments made by the purchaser of goods, on behalf of the seller, was covered by the UCTA, and the reasonableness of such a clause. Also, see the discussion of unequal bargaining position in Ch 2 para 2.5. See *Press Automation Technology Pte Ltd v Trans-Link Exhibition Forwarding Pte Ltd* [2003] 1 SLR (R) 712 for a decision where the reasonableness of limiting liability, as well as an allegation of weak bargaining position were discussed. In this case, the court found that limiting liability to S\$100 000 was reasonable and that the plaintiff had sufficient bargaining power and freedom of choice of a contractor, not to be regarded as being in a weak bargaining position.

<sup>209</sup> Booysen (2016) *SJLS* 222.

<sup>210</sup> Business is defined in s 14 as: "business" includes a profession and the activities of any Government department or local or public authority;" this does not provide guidance whether a business can rely on the protective measures afforded to consumers, and does not specifically include or exclude for instance smaller companies or businesses'.

<sup>211</sup> 'Section 12(1) A party to a contract "deals as consumer" in relation to another party if – he neither makes the contract in the course of a business nor holds himself out as doing so;' This is in contrast to the CPA where juristic persons are protected if their annual turnover falls within the threshold amount provided for in terms of s 6 of the CPA.

<sup>212</sup> Loke (2014) *SJLS* 288-289. He, however, bases this view on a UK case. See Booysen (2016) *SJLS* 226 for a contrasting view.

<sup>213</sup> [2013] 1 SLR 1 (hereafter *Kay Lim*).

<sup>214</sup> *Kay Lim* 36-38.

the view in the *Kay Lim* judgment and argues that the term consumer in the UCTA includes commercial entities.<sup>215</sup>

Booyesen argues that businesses can be in an inferior bargaining position in certain circumstances, but cannot rely on the UCTA for protection; they must resort to the protection afforded by the MA.<sup>216</sup> An interesting provision in item (a) of the Second Schedule to the UCTA provides that the strength of bargaining positions of the parties should be considered for purposes of sections 6(3), 7(3) and (4),<sup>217</sup> which could imply that businesses can be considered if they are in a weaker bargaining position. In addition, when section 3(1) of the UCTA is analysed one can argue that businesses are included in the protection of the UCTA based on the second part of section 3(1), namely, 'or on the other's written standard terms of business', as this implies inequality in bargaining position. The court confirmed Booyesen's contention that a business can sometimes be in a weaker bargaining position and should be protected in suitable circumstances in *Jurong Port Pte Ltd v Huatong Inland Transport Service Pte Ltd*.<sup>218</sup> However, there is neither clarity nor unanimity on this point.

In South Africa, juristic persons with an annual turnover under the threshold value are included in the protection of the CPA.<sup>219</sup> But, section 14(1) of the CPA excludes transactions between juristic persons from the protection of section 14 of the CPA.<sup>220</sup>

The UCTA is compliance-based legislation,<sup>221</sup> and a further point of criticism is that there are no criminal sanctions for contraventions of section 2(1) of the UCTA.<sup>222</sup>

I now turn to case law in Singapore to establish if there are pitfalls or lessons to be learnt.

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<sup>215</sup> Latimer

<https://poseidon01.ssrn.com/delivery.php?ID=16612108410108510801507410507601403103702003405201005002807101412712500207610001910105> (date of use: 15 May 2020) 23. Latimer does not provide a specific page or paragraph in the case to substantiate this argument, but the relevant part is 36-38 of the case.

<sup>216</sup> Booyesen (2016) *SJLS* 226. The CPFTA does not assist businesses as they are expressly excluded, and this can be regarded as a disadvantage as smaller businesses could also be in need of protection in certain circumstances.

<sup>217</sup> In the main, these sections deal with transactions where a party deals 'otherwise than as a consumer'.

<sup>218</sup> Although this was an *obiter dictum* [2009] 4 SLR (R) 53 (hereafter *Jurong*).

<sup>219</sup> See Ch 4 para 4.2.3.6.1.

<sup>220</sup> See Ch 4 para 4.2.3.7.6. This is open to criticism as smaller businesses can in certain circumstances be in a weaker bargaining position, or perhaps even be regarded as vulnerable.

<sup>221</sup> Booyesen (2016) *SJLS* 232 criticises the fact that there was no body to monitor and apply the UCTA. After this, there were proposals for the Standards Productivity and Innovation Board Act (SPRING) to monitor and apply the UCTA, see Booyesen n 46. However, the Standards Productivity and Innovation Board Act was repealed in 2018.

<sup>222</sup> Booyesen (2016) *SJLS* 227.

### 5.5 Case law

As a first step in the enforcement of their rights, consumers must report their claims to the CASE. This is done either by phoning the CASE for advice, going to the CASE offices for counter service,<sup>223</sup> or by submitting an online complaint form.<sup>224</sup> The CASE then provides assistance in the form of advice,<sup>225</sup> or attempts to resolve the dispute by correspondence.<sup>226</sup> If a dispute is not settled by the CASE to the satisfaction of the consumer, he or she can appeal the decision, and only then does the matter go to court and is reported. Similar to the South African scenario,<sup>227</sup> the amounts involved are not necessarily large enough to justify legal costs and the institution of court proceedings.<sup>228</sup>

The CASE has a relatively high success rate.<sup>229</sup> Most disputes are settled successfully during alternative dispute resolution procedures or are heard by the Small Claims Tribunal. Consequently, they are not officially reported.<sup>230</sup> The result is that there is no full record of these decisions to assist with uniformity in the analysis of the CPFTA, the setting of precedents as guidance for future decisions, and the development of consumer protection law.<sup>231</sup>

There are a few important court decisions which illustrate how courts in Singapore interpret and apply consumer law and, more specifically, the provisions of the CPFTA. In some of the decisions the common law is discussed, which is relevant to section 14 of the CPA, as section 2(10) of the CPA provides common-law rights are retained. Unfortunately, no judgment on fixed-term contracts could be found.

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<sup>223</sup> See <https://www.case.org.sg/complaint.aspx> (date of use: 13 November 2019).

<sup>224</sup> See [https://www.case.org.sg/complaint\\_onlinecomplaint.aspx](https://www.case.org.sg/complaint_onlinecomplaint.aspx) (date of use: 28 April 2019). Note that fees are payable to the CASE, although it is a non-profit consumer association, not a statutory organisation. For more information on the procedure and the fees payable see, [https://www.case.org.sg/complaint\\_lodgeacomplaint.aspx](https://www.case.org.sg/complaint_lodgeacomplaint.aspx) (date of use: 13 November 2019).

<sup>225</sup> These opinions and advice appear to be non-binding as they are not strictly regarded as legal advice. See <https://singaporelegaladvice.com/law-articles/consumer-rights-in-singapore/> (date of use: 15 November 2019); <https://www.cccs.gov.sg/approach-cccs/making-complaints> (date of use: 15 November 2019) and [https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=4501&context=sol\\_research](https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=4501&context=sol_research) (date of use: 15 November 2019).

<sup>226</sup> Paterson & Wong (2016) *SAC LJ* 1083, this is an informal procedure, in contrast to the procedures in the CPA where the CC steps in.

<sup>227</sup> Note that in South Africa the small claims court can be used subject, however, to s 7 which allows only natural persons to institute action in the small claims court. Small Claims Court Act 61 of 1984. The jurisdictional limit of the small claims court in South Africa is currently R20 000. Because the disputed claims are not necessarily based on or arising out of a liquid document most claims cannot be adjudicated by small claims courts.

<sup>228</sup> See Ch 4 para 4.2.3.1.

<sup>229</sup> See [https://www.case.org.sg/consumer\\_guides\\_statistics.aspx](https://www.case.org.sg/consumer_guides_statistics.aspx) (date of use: 7 May 2019).

<sup>230</sup> Paterson & Wong (2016) *SAC LJ* 1079 1083. Also see the statistics available on the CASE website [https://www.case.org.sg/consumer\\_guides\\_statistics.aspx](https://www.case.org.sg/consumer_guides_statistics.aspx) (date of use: 29 April 2019).

<sup>231</sup> This is similar to the South African situation where there are limited records available of the adjudication of consumer disputes. See Ch 4 para 4.3.7.1.

### 5.5.1 *Freely Pte Ltd v Ong Kaili and Others*<sup>232</sup>

One of Singapore's consumer-law cases most often cited is *Freely v Ong*. This case deals with misrepresentation in section 4 of the CPFTA. The appellant (Freely), advertised a course in the *Straits Times* in which he represented himself as holding a PhD from a prominent university. He also advertised software at a special price on the day of the course. During the presentation of the course Freely digressed to irrelevant matters and was abusive towards the attendees. When the respondents sought a refund of the fees paid, Freely refused and denied all the allegations. The respondents instituted a claim against Freely. The Small Claims Tribunal examined the parliamentary debates surrounding the adoption of the CPFTA to establish its aims and purposes, the origin of the legislation, the intention of the legislature, and how the CPFTA should be interpreted.

The referee decided that Freely was liable under section 4(a) of the CPFTA as he had misled the course attendees. Freely was ordered to refund a part of the course fees – ie, the difference between actual course fees paid and the amount the curriculum was estimated to be worth in the market.<sup>233</sup> Freely also had to refund the full price of the software to attendees and contribute S\$10 to each claimant for disbursements.<sup>234</sup> This order was confirmed in an appeal to the High Court.

This decision illustrates how fairness provisions in consumer protection legislation can assist consumers who have been misled.

Another important case is *Speedo Motoring Pte Ltd v Ong Gek Sing*<sup>235</sup> which addresses the Lemon Law and refers to the principle of unequal bargaining positions. This aspect could be relevant to the South African position, specifically to cell phone, timeshare, and gym contracts.<sup>236</sup>

### 5.5.2 *Speedo Motoring Pte Ltd v Ong Gek Sing*<sup>237</sup>

In *Speedo v Sing* the respondent, Sing, bought a three year old second-hand hybrid motor vehicle without purchasing the extended warranty. Speedo, the appellant supplier, sent the vehicle for an independent evaluation test at their own cost and the car was rated a B vehicle. The supplier represented that the vehicle had been serviced regularly and was in very good condition. Soon after purchase, numerous defects emerged and it became clear that the car had not been serviced regularly. The brakes and tyres needed to be replaced. Shortly thereafter, the hybrid system

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<sup>232</sup> [2010] 2 SLR 1065 (hereafter *Freely v Ong*).

<sup>233</sup> This relates to the application of s 6 of the CPFTA regarding damages suffered by the claimants. The referee also discussed ss 28 and 30 of the Small Claims Tribunal Act 27 of 1984, which is not directly relevant for purposes of this study.

<sup>234</sup> See s 74(3) read with s 115(2) of the CPA which provides for damages.

<sup>235</sup> [2014] 2 SLR 1398 (hereafter *Speedo v Sing*).

<sup>236</sup> Although this specific judgment dealt with second-hand goods, the basic principle remains the same.

<sup>237</sup> *Speedo v Sing*.

gave problems and then the hybrid battery required replacement. Sing contacted Speedo but they failed to respond to his requests for a refund.

Sing approached the Small Claims Tribunal. He initially claimed the cost of the brakes, the tyres and the replacement of the hybrid battery. He was awarded a percentage of the costs for the battery only, as the referee found that the tyres and brakes were subject to normal wear and tear. The referee also decided he should not be refunded the full purchase price of the new battery as it was a used car. The court held that the evaluator's report would not protect the seller as the hybrid battery did not form part of that evaluation. As the CPFTA provides for the weaker bargaining position of the consumer, the purpose of the CPFTA is to provide protection and recourse for consumers in these circumstances.<sup>238</sup> It further found that parties could not opt to exclude the application of the CPFTA, as stated in section 13(1) of the CPFTA.<sup>239</sup> The court decided that the hybrid battery was an integral part of the hybrid vehicle. As the whole purpose of buying such a vehicle was to save on fuel costs, the battery could not be seen as a minor component like wiper blades or a faulty cabin light, and Sing was therefore entitled to a partial refund. Speedo appealed, the decision of the Small Claims Tribunal was confirmed on appeal.<sup>240</sup>

The following aspects of relevance for this thesis were considered in this decision:

- the unequal bargaining position of the purchaser;
- whether the CPFTA applied as Sing had not bought the extended warranty;
- whether the Lemon Law applied as the vehicle did not conform to the contract at the time of delivery;<sup>241</sup> and

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<sup>238</sup> *Speedo v Sing* para [28].

<sup>239</sup> *Speedo v Sing* paras [30]-[34]; Chandran *Business Law* 174.

<sup>240</sup> For a discussion of the application of the Lemon Law to the purchase of second-hand vehicles and a discussion of this judgment, see Che & Toh [https://www-lawnet-sg.libproxy1.nus.edu.sg/lawnet/group/lawnet/page-content?p\\_p\\_id=legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet&p\\_p\\_lifecycle=2&p\\_p\\_state=normal&p\\_p\\_mode=view&p\\_p\\_resource\\_id=viewPDFSourceDocument&p\\_p\\_cacheability=cacheLevelPage&p\\_p\\_col\\_id=column-2&p\\_p\\_col\\_count=1&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_documentID=%2FCommentaries%2F86559-M.xml&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_loadPage=0&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_prevPage=-1&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_nextPage=1&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_viewType=&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_contentDocID=%2FCommentaries%2F86559-M.xml&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_queryStr=%28Consumer+protection+Fair+trading+Act%29+AND+%28Speedo%29&\\_legalresearchpagecontent\\_WAR\\_lawnet3legalresearchportlet\\_implicitModel=true&pdfFileName=LGUPD\\_\[2014\]\\_RJTN\\_33\\_v1.0.pdf&pdfFileUri=/Commentaries/86559-M/resource/LGUPD\\_\[2014\]\\_RJTN\\_33\\_v1.0.pdf](https://www-lawnet-sg.libproxy1.nus.edu.sg/lawnet/group/lawnet/page-content?p_p_id=legalresearchpagecontent_WAR_lawnet3legalresearchportlet&p_p_lifecycle=2&p_p_state=normal&p_p_mode=view&p_p_resource_id=viewPDFSourceDocument&p_p_cacheability=cacheLevelPage&p_p_col_id=column-2&p_p_col_count=1&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_documentID=%2FCommentaries%2F86559-M.xml&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_loadPage=0&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_prevPage=-1&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_nextPage=1&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_viewType=&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_contentDocID=%2FCommentaries%2F86559-M.xml&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_queryStr=%28Consumer+protection+Fair+trading+Act%29+AND+%28Speedo%29&_legalresearchpagecontent_WAR_lawnet3legalresearchportlet_implicitModel=true&pdfFileName=LGUPD_[2014]_RJTN_33_v1.0.pdf&pdfFileUri=/Commentaries/86559-M/resource/LGUPD_[2014]_RJTN_33_v1.0.pdf) (date of use: 27 May 2019).

<sup>241</sup> Section 12B(1) of the CPFTA.



- what an appropriate remedy would be under the relevant section of the CPFTA?

This is a thorough and fair decision. The court considered the weaker bargaining position of the consumer and held that this is why the CPFTA specifically provides that provisions of the Act cannot be excluded by contract. Therefore, the provisions of the CPFTA applied even when a purchaser does not purchase the extended warranty. The court did not award the full repair and replacement costs, as the vehicle was second-hand and normal wear and tear could be expected. This judgment provides guidance to suppliers of second-hand vehicles, especially the importance of the duty of the supplier to disclose potential defects and allow an opportunity for a purchaser to inspect the vehicle thoroughly.

### 5.5.3 *Chwee Kin Keong and Others v Digilandmall.com Pte Ltd*<sup>242</sup>

In *Chwee Kin Keong and Others v Digilandmall.com Pte Ltd* an employee of the seller (Digiland) made a *bona fide* mistake by pricing laser printers on the internet at S\$66.00 instead of S\$3 854.<sup>243</sup> The plaintiffs and 778 other purchasers bought printers at the incorrect price before Digiland realised the mistake. The plaintiffs (Chwee and his 6 friends) had communicated with each other regarding the low price, and the news spread fast.<sup>244</sup> From the cellular phone short message system record and e-mails, it was clear that, as purchasers, they were aware that there had been a mistake and they aimed to make a huge profit based on this mistake.<sup>245</sup> When Digiland became aware of the mistake it immediately removed the faulty advertisement.<sup>246</sup> It then informed the purchasers (despite the automated system's confirmation of their orders) that the price was a mistake and that it would not honour the orders.<sup>247</sup> When Digiland informed the plaintiffs that it would not deliver the printers, as a mistake had been made, the plaintiffs went to the press.<sup>248</sup>

The plaintiffs claimed that a concluded contract must be honoured otherwise there would be no legal certainty, especially regarding internet transactions.<sup>249</sup> (They had ordered multiple printers – between 50 and 100 each – because of the error and clearly did not intend them for personal use.) The defendant, of course, argued that

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<sup>242</sup> [2004] 2 SLR (R) 594 (hereafter *Chwee Kin Keong* High Court). This decision was taken on appeal in *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2005] 1 SLR (R) 502 (hereafter *Chwee Kin Keong* Appeal Court) and the appeal was dismissed, except as to the cost factor. The High Court decision will be analysed, not the appeal decision, as the facts, circumstances, and merits of the case were discussed in greater detail in the High Court judgment.

<sup>243</sup> Para [7] *Chwee Kin Keong* High Court. Also see s 23(9) of the CPA relating to inadvertent and obvious errors in pricing.

<sup>244</sup> *Chwee Kin Keong* High Court para [10].

<sup>245</sup> *Chwee Kin Keong* High Court paras [12]–[71].

<sup>246</sup> *Chwee Kin Keong* High Court para [76].

<sup>247</sup> See s 23(9) of the CPA in this regard.

<sup>248</sup> The court drew a negative conclusion from this – *Chwee Kin Keong* High Court para [77].

<sup>249</sup> *Pacta servanda sunt*. See the discussion in Ch 3 para 3.2.2 and Ch 4 paras 4.2.3.7 and 4.4.5.4 for the position in South Africa.

the law should not punish a party for making a genuine mistake of which the purchasers should have known. The defendant pointed out that Digiland would in effect lose more than S\$6 000 000 if the transactions were to be honoured.<sup>250</sup>

The court considered the following issues:

- Should the principle of *pacta servanda sunt* prevail in these circumstances?
- Is there a need to give effect and execute electronic transactions in commerce?<sup>251</sup>
- What is the role of *consensus ad idem* and honest mistake when concluding an agreement?
- How to balance the interests of the consumer and supplier.
- The need to apply common sense to solve problems, while at the same time having the necessary regard for legal principles and ensuring legal certainty.

The crux of the matter for the court, was that a reasonable man looking objectively at the offer would realise or suspect that something was amiss. It was also 'improper' for someone who realised there was an error to try to benefit commercially from this error.<sup>252</sup> The court investigated the qualifications, backgrounds, and professional and personality traits of each plaintiff, as well as the messages and e-mail communications of each. It decided that the contract was void *ab initio* as there was no *consensus ad idem*, because of the error in pricing of the item. It added that a party who is in fact labouring under a mistake, may not take advantage of such clearly improper circumstances.<sup>253</sup> The court described the plaintiffs' conduct as 'audacious, opportunistic and contrived', and compared it to 'predatory pack-hunting'.<sup>254</sup> Chwee appealed but the decision was upheld.<sup>255</sup>

This judgment is an illustration of a court bold enough to use honesty, fairness, equity, and the common-law principle of *consensus ad idem*, carefully balanced against the strict application of *pacta servanda sunt*, the principle of giving effect to internet transactions, and a general presumption in favour of consumers, to find in favour of the trader. This was so despite the presumption in section 18 of

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<sup>250</sup> Approximately 74 million South African Rand, calculated on 18 June 2020.

<sup>251</sup> *Chwee Kin Keong* High Court para [103].

<sup>252</sup> Paras [140], [147]-[149] *Chwee Kin Keong* High Court. In South Africa such an incident is covered by s 23(9) of the CPA.

<sup>253</sup> Para [149] *Chwee Kin Keong* High Court.

<sup>254</sup> *Chwee Kin Keong* High Court para [151]. *Chwee Kin Keong* Appeal Court para [107]. For further discussions on this case see Kwek (2005) *SAC LJ* 411-425 for the link between fairness and commerce; and Koh (2005) *LawLines* 24-27 for a discussion of the impact of the decision on internet transactions. See also Yeo (2004) *SJLS* 227-240.

<sup>255</sup> *Chwee Kin Keong* Appeal Court para [107].

Singapore's CPFTA that an ambiguous provision in a consumer contract must be interpreted in favour of the consumer.<sup>256</sup>

Lessons to be learnt from the way the court decided this case:

- The need for courts thoroughly to investigate the facts, the litigating parties, and their circumstances in making a value judgement for purposes of consumer-law cases. This emphasises the need to abolish the parole evidence rule in consumer-law cases so that courts are able to consider all relevant circumstances – including e-mails and documents in reaching a fair decision.
- The need to apply fairness and equity judicially and sparingly in suitable circumstances despite rigid rules like *pacta servanda sunt*.
- The courage of the court in finding against consumers as there is a general tendency to decide in favour of consumers, presumably as a result of consumer-protection legislation normally containing provisions specifically providing for the presumption of benefit for consumers in cases of ambiguity.<sup>257</sup>
- The need for common-law principles based on fairness to be retained and to prevail over strict maxims in suitable circumstances.
- The practical and common-sense approach the court used to consider the facts and balance the interests of the parties, common-law legal principles, strict legal maxims, and legislation to reach a fair judgment.

The effect of this judgment in practice is that a high premium should be placed on honesty and integrity in commercial transactions. The judgment emphasises the essential role of courts in ensuring justice and fairness.<sup>258</sup>

#### 5.5.4 Examples of continued consumer abuses in Singapore<sup>259</sup>

Unfortunately, a prudent judgment such as *Chwee Kin Keong* that sets high standards of integrity and honesty for contracting parties, has not changed unscrupulous behaviour by merchants in Singapore. In 2014, an incident was reported in the press in which a Vietnamese tourist signed an agreement for a cell phone for his girlfriend costing S\$950. He was not fluent in English and was not informed, or did not understand, that the warranty included in the agreement cost an additional S\$1500. He could not pay for the warranty and begged for

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<sup>256</sup> Similar to ss 2(9) and 4(3) of the CPA.

<sup>257</sup> In Singapore s 18 of the CPFTA has this effect, although this case was not decided in terms of the CPFTA.

<sup>258</sup> See Ch 2 para 2.4.2; Pound (1908) YLJ 482-483, 487.

<sup>259</sup> See Paterson & Wong (2016) SAcLJ 1079-1110 for a detailed discussion of this incident and the Singapore consumer protection law.

reimbursement, but the supplier only offered to return part of the money, which offer was refused. The CASE intervened and the tourist received a refund of S\$400.<sup>260</sup>

In another incident in 2014, also involving a mobile phone, a student bought a mobile phone and after signing the agreement, was told to pay an additional S\$1000 for a warranty. She was told that the warranty was S\$39.90 but did not realise that figure was not the total amount in respect of the warranty, but the amount per month. She claimed that the salesperson had misled her by placing his finger over the words that indicated that the S\$39.90 was per month, and told her to sign. She ended up having to pay S\$551 despite the fact that she could not afford the amount.<sup>261</sup>

These and similar incidents led to an amendment to the CPFTA in 2016, which gave the Commission investigative (as opposed to reactive) powers<sup>262</sup> to ensure proactive consumer protection. Prior to this, the Commission could only act after a complaint had been lodged by a consumer. Proactive consumer protection, when effectively utilised by the Commission, could potentially assist in curtailing these abuses by suppliers.<sup>263</sup> A similar proactive measure in the CPA would greatly benefit consumer protection in South Africa which is essentially reactive.<sup>264</sup>

These incidents demonstrate that, despite the Singapore legislature's best efforts to provide effective consumer protection measures, and excellent judgments by courts and consumer protection institutions and administrative bodies, consumers should still value, and apply, the adage *caveat subscriptor* to protect themselves.<sup>265</sup> Even when legislation exists aimed specifically at preventing these unfortunate incidents, exploitation of vulnerable consumers continues. Some writers, therefore, advocate criminal sanctions to penalise perpetrators.<sup>266</sup>

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<sup>260</sup> See Chew <https://www.straitstimes.com/singapore/vietnamese-tourist-kneels-and-begs-for-refund-of-iphone-6-at-sim-lim-square-0> (date of use: 24 April 2019); Loo & Ong (2017) *University of Tasmania Law Review* 15-48.

<sup>261</sup> See Baker <https://www.straitstimes.com/singapore/another-sim-lim-incident-student-reduced-to-tears-after-being-charged-1000-for-warranty-0> (date of use: 25 April 2019).

<sup>262</sup> See the discussion of the powers of the Commission in para 5.1 above.

<sup>263</sup> Although there has been fierce criticism of abuses by cellular phone traders, most of these are aimed against unfair trade practices, and the proposal to curb these abuses does not mention the regulation of these contracts by a provision similar to s 14 of the CPA. Leck & Jun (2015) *Intellectual Property* 1.

<sup>264</sup> Although measures such as the black and grey lists of prohibited terms could be regarded as a proactive measure. See the discussion in Ch 4 para 4.3.7.

<sup>265</sup> Parliamentary Debate on 10 November 2003 available at <https://sprs.parl.gov.sg/search/report?sittingdate=10-11-2003> (date of use: 29 May 2020).

<sup>266</sup> See para 5.3.2.10 above.

## 5.6 Conclusion: Chapter 5

The purpose of the CPFTA is neither ideological nor socio-political. An analysis of the deceptively simple purpose of the CPFTA and its effect, interpretation, and implementation shows that the Act, together with the UCTA when appropriate, the improved investigative powers of the Commission, the CASE, and decisive court decisions, has resulted in the empowerment of and protection for consumers without political or socio-economic aims. The CPFTA provides consumers with assistance and information, ensures fair trading circumstances for traders, is just and equitable, and is probably more effective in reaching socio-economic goals than politically motivated legislation would be.<sup>267</sup> This is because it empowers consumers with effective rights, education, and information and stays true to purpose.<sup>268</sup> When this is done effectively, the secondary goals follow *ipso facto*.

The advantages of the consumer law regime, the way legislation is interpreted by courts, and the important role of the CASE and the Commission in the Singaporean consumer-law regime relevant to section 14 of the CPA, and to the CPA in general, are:

- There is no specific provision for fixed-term contracts – all consumer contracts are covered by the CPFTA so eliminating many of the disadvantages mentioned in Chapter 4.<sup>269</sup> This is especially true when dealing with lease agreements.<sup>270</sup> The only exception is time-share, which must be for a period in excess of three years.
- Provisions in the CPFTA are wide enough to protect consumers against most forms of foreseeable unfair and unconscionable conduct by suppliers.
- The wide investigative powers granted to the authorities have resulted in excellent and detailed decisions by the courts, consumer protection institutions, and administrative bodies.
- Parliamentary debates are considered important in establishing the true intention of the legislature and the true purpose of legislation. The courts consult these debates when considering judgments to achieve these goals.<sup>271</sup>
- An effective Consumer Association is essential which can:

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<sup>267</sup> Especially in countries where the government changes regularly, and these regimes potentially could have vastly differing or contrasting policies. Examples of regular changes in governments are found in France and Italy. See Harris <https://www.euronews.com/2016/12/13/why-do-italian-governments-change-so-often> (date of use: 24 September 2019). Another example of this is the Brexit situation in the United Kingdom – where UK legislation was amended to align UK legislation with similar legislation in the European Union. After this, of course, the UK voted to exit the EU. Since 31 January 2020 the UK is no longer part of the EU see <https://www.bbc.com/news/uk-politics-32810887> (date of use: 27 March 2020). See further Ch 6 para 6.3.1.

<sup>268</sup> Through the CPFTA, the CASE, and good court decisions.

<sup>269</sup> See the discussion in Ch 4 para 4.5.

<sup>270</sup> See the discussion in Ch 4 para 4.2.3.8.

<sup>271</sup> *Freely v Ong* para [22], for instance.

- provide information on its website;
  - provide a forum where claims can be initiated;
  - assist consumers when reporting a claim; and
  - deliver a high success rate in resolving consumer disputes.
- Effective Small Claims Tribunals and alternative dispute resolution measures and institutions are necessary.<sup>272</sup>
- Consumers require effective empowerment through the provision of effective rights and remedies that they can use actively – eg, section 6 and the detailed remedies provided in the Lemon Law.
- The fact that effective and accessible information and the education of consumers by the CASE on its website contributes to inform consumers, and makes relevant information easily accessible.<sup>273</sup>
- The express exclusion of the parol evidence rule for warranties in the CPFTA, and its implied exclusion in section 5(3)(a) contributes to fairness and justice in court decisions and compensates the consumer in an unequal bargaining position to some extent.<sup>274</sup>
- The express inclusion of lease agreements for immovable property in the protection of the CPFTA leads to greater certainty that leases of immovable property indeed fall within the ambit of the Act.<sup>275</sup>
- There is no limitation on the duration of contracts. Therefore, there is no fixed term that could negatively affect consumers, suppliers, or other legislation or registered agreements.<sup>276</sup>
- The fact that the Commission can now act proactively to initiate investigations in terms of section 12G, and it is no longer complaint-based.
- The fact that when there is a need for amendments, either by way of criticism of writers or when a need is established in practice, the legislature reacts and amends the position – eg, the insertion of sections 12G to 12V of the CPFTA, the amendment of time-share provisions in 2009, and the extended and proactive powers of the Commission.
- The balanced approach the legislature and the courts follow as consumers still have the responsibility to value the maxim *caveat emptor*, despite the effective protection and empowerment provided in the CPFTA.<sup>277</sup>
- The preference of specific performance over rescission, so upholding the application of the principle *pacta servanda sunt*.<sup>278</sup>

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<sup>272</sup> Although South Africa has similar commendable measures in the CPA, these have unfortunately been found to be time-consuming and ineffective in practice. For a discussion see Ch 4 para 4.3.7.

<sup>273</sup> See, eg, [https://www.case.org.sg/consumer\\_guides.aspx](https://www.case.org.sg/consumer_guides.aspx) (date of use: 13 November 2019).

<sup>274</sup> See the discussions in para 5.3.2.9.1 above; Ch 4 para 4.3.2.7; and Ch 6 para 6.3.6.

<sup>275</sup> See para 5.3.2.1.2 above and contrast the position in South Africa in Ch 4 para 4.2.3.8.

<sup>276</sup> See the discussion of this aspect in Ch 4 paras 4.2.3.7 and 4.2.3.8.

<sup>277</sup> See paras 5.3.2.5 and 5.3.2.10 above.

<sup>278</sup> See para 5.3.2.7 above.

## The Law of Singapore: Consumer protection and fixed-term agreements

- The CPFTA is principle-based legislation and as a result courts retain a discretion to base their decisions on the particular facts of a case.
- As a leading commercial centre, Singapore has proved that empowered, educated, and confident consumers can negotiate with suppliers and compare products. This ensures healthy competition and stimulates a vibrant economy so ensuring improved socio-economic circumstances.
- The name-and-shame policy in sections 9(5)(b) and 9(7)(b) of the CPFTA is transparent, and ensures that consumers are aware of the identity of transgressors and the extent of their transgressions. In addition, this should encourage non-compliant suppliers to meet the provisions of the CPFTA.
- The continued supervision of errant suppliers by the Commission in terms of section 9 of the CPFTA, ensures adherence to the provisions of the Act.
- Section 18A of the CPFTA provides that the burden of proof rests on suppliers which eases the burden for the consumer, who is not necessarily informed or familiar with procedure or the extent of the burden of proof and its requirements in complaint procedures.

The following pitfalls remain in Singapore's consumer-law regime:

- The CPFTA, does not expressly include protection for small businesses that could have benefited from these measures and arguably are also in need of protection because they could also be in an unequal bargaining position.<sup>279</sup>
- The fact that claims in terms of the CPFTA are financially limited could possibly be detrimental to its advantage for consumers as it is not available for all consumer-law cases.<sup>280</sup>
- Theoretically, employees and agents could be held personally liable for misrepresentation,<sup>281</sup> despite a provision for vicarious liability. This measure could be regarded as superfluous, or perhaps, was intended as an additional preventative measure.
- The CPFTA only contains civil remedies and so is not necessarily an effective deterrent for unscrupulous behaviour by merchants.<sup>282</sup>
- Because the Small Claims Tribunal and ADR decisions are not reported, there is no full record of all consumer law decisions.<sup>283</sup> This holds serious consequences as there are no formal records to set precedents or

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<sup>279</sup> *Jurong Port Pte Ltd v Huatong Inland Transport Service Pte Ltd* [2009] 4 SLR (R) 53 para [19]. However, there are writers who argue that small business can be covered, see para 5.3.2.1.1 above.

<sup>280</sup> Chandran *Business Law* 174.

<sup>281</sup> See discussion of the definition of supplier in para 5.3.2.1.5 above.

<sup>282</sup> Two incidents reported in *Straits Times*. Although now that the Commission has been granted investigative powers, we shall have to see whether this proves effective against unscrupulous traders in practice. See Chandran *Business Law* 174.

<sup>283</sup> However, this problem is shared by most jurisdictions.

guidelines for future decisions to ensure legal certainty and consistency.<sup>284</sup>

- The Small Claims Tribunal as a court of first instance can also be criticised because of its limited jurisdiction.<sup>285</sup>
- Concerns have been expressed about insufficient protection for consumers in prepaid agreements – eg, gym contracts. However, compulsory insurance cover has been proposed to protect consumers in these agreements when suppliers are liquidated or run into financial trouble.<sup>286</sup>
- There is an alleged overlap between the CPFTA and the Lemon Law provisions. Subtle differences in definitions between these two pieces of legislation could complicate, rather than simplify, the position in practice. The Lemon Law was inserted with good intentions, and perhaps the overall protection afforded consumers compensates for the slight overlap and possible confusion.<sup>287</sup>
- Finally, a directive or section in the CPFTA explaining the exact status of the CASE and its opinions and advice would be helpful, as there appears to be no official information available on this issue.

Overall, the CPFTA can be regarded as a success in that it balances the rights of all interested parties fairly, it is proactive, and it contains effective redress and enforcement measures.

South Africa can clearly learn from the provisions of the CPFTA relevant to fixed-term contracts under the CPA. In Chapter 6, I analyse and discuss the relevant provisions of the United Kingdom's consumer legislation, in particular the Consumer Rights Act, to determine whether this too can offer guidance in improving the position of consumers under fixed-term agreements in terms of the CPA.

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<sup>284</sup> See para 5.5 above.

<sup>285</sup> The jurisdiction of the Small Claims Tribunal is set out in the Small Claims Tribunals Act (Cap 308), and there is uncertainty in Singapore whether the Tribunal can order specific performance. See Chandran *Business Law* 172 n 37; Chandran (2004) *SJLS* 219.

<sup>286</sup> Ng available at <https://www.todayonline.com/singapore/mps-lawyers-call-more-safeguards-consumers-buying-prepaid-deals> (date of use: 20 June 2019) 1.

<sup>287</sup> See para 5.3.2.7.



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## CHAPTER SIX: The Law of the United Kingdom: Consumer protection and fixed-term agreements

### 6.1 Introduction

In this chapter I consider consumer legislation and case law in the United Kingdom (UK) relevant to fixed-term contracts. The UK has incorporated European Union<sup>1</sup> Directives and case law into its consumer law, and these will be addressed where applicable.<sup>2</sup> Although the focus does not fall on UK's common-law of contract, applicable areas of the common law will be considered where they play an important role in statutory consumer law.<sup>3</sup> The discussion centres round the definitions and various relevant aspects of the Consumer Rights Act 2015 (CRA), the duration of contracts, and the protection afforded to consumers by UK time-share legislation. The fairness provisions in contracts are considered before briefly examining the procedures consumers are required to follow to enforce their rights under the CRA. The analysis of relevant UK case law to establish if we can learn from UK experience, closes the chapter.

Electronic and cross-border international transactions are not considered and a detailed discussion of all remedies at the disposal of consumers in terms of the CRA falls outside the scope of this thesis.<sup>4</sup>

The UK has left the EU (Brexit) without a negotiated deal,<sup>5</sup> and this could have a significant impact on the UK's consumer protection law regime, given the UK's decision to include EU Directives, Guidance on the Directives, and EU case law in

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<sup>1</sup> The European Union (EU) is a European political and economic union established in 1993 when the Maastricht Treaty came into force. The EU has developed an internal EU market with standardised legislation. See <https://www.britannica.com/topic/European-Union> (date of use: 16 January 2020). The EU was preceded by the EEC established in 1957 by the Treaty of Rome. See <https://www.britannica.com/topic/European-Union/Creation-of-the-European-Economic-Community> (date of use: 16 January 2020).

<sup>2</sup> The EU Directives have grown in importance since the 1980s and were formally implemented in 2008 in the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277). See Beale *Chitty on Contracts* vol II 38-003–38-005, 38-013–38-015. EU case law will not be discussed under the case law heading in this chapter but where relevant to the discussion – only UK case law will be discussed under the case law heading. The EU case law is important to assist with the interpretation of the same or similar concepts in the UK. Beale *Chitty on Contracts* vol II 38-003, 38-017–38-024. See Barnard (2017) *SA Merc LJ* 353-389 on the importance of comparative law, especially the law of the EU.

<sup>3</sup> Courts in the UK have not intentionally developed the common-law of contract to regulate consumer-law contracts between traders and consumers, although some of the developments in judgments may have had this effect. See Beale *Chitty on Contracts* vol II 38-001.

<sup>4</sup> For an overview of the history and development of consumer law in the UK see Andrews *Enforcement* 1129-1160.

<sup>5</sup> The UK left the EU at 23h00 on 31 January 2020. See <https://www.bbc.com/news/uk-politics-32810887> (date of use: 27 March 2020); <https://www.government.nl/topics/brexit/brexit-where-do-we-stand> (date of use: 27 March 2020). There will be a transition period until 31 December 2020 and during this time all EU rules and regulations will apply in the UK. See <https://www.government.nl/topics/brexit/brexit-where-do-we-stand> (date of use: 27 March 2020).

UK consumer law. It must, however, be borne in mind that the long-term future of these instruments and their continued role in UK consumer law is uncertain.<sup>6</sup>

I conclude the chapter by highlighting the advantages, disadvantages, and lessons to be learnt from the UK consumer-law regime.

## 6.2 Background and history

The UK does not have a formal constitution but constitutional principles are found in legislation, case law, and in the customs and values of parliament.<sup>7</sup> While the purposes and aims of consumer law have always been straightforward – to protect consumers from potential harm, to provide for a fair trading environment, and to provide redress for harmed parties – in practice the means for achieving these aims have always been problematic.<sup>8</sup> Reports on the need to improve the UK consumer-

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<sup>6</sup> The UK's decision to leave the EU will be referred to as Brexit see <https://www.nytimes.com/interactive/2019/world/europe/what-is-brexit.html> (date of use: 21 June 2019); <https://en.wikipedia.org/wiki/Brexit> (date of use: 21 June 2019); for a general discussion of the effects of Brexit see Bruton <https://www.fairobserver.com/region/europe/brexit-european-union-britain-united-kingdom-theresa-may-uk-election-result-latest-europe-news-today-97421/> (date of use: 21 June 2019). For an analysis of the legal implications of Brexit see Gee et al <https://www.birmingham.ac.uk/Documents/college-artslaw/law/iel/leaving-EU-legal-impact-brexit-gee-rubini-trybus.pdf> (date of use: 21 June 2019) especially 47-51; for more detail on the inclusion of EU consumer rights in the CRA see Giliker (2017) LS 78 -102. For guidance on how consumer protection law is enforced after a 'no deal' exit from the EU see [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/786749/EU\\_Exit\\_Guidance\\_Document\\_for\\_No\\_Deal\\_final.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786749/EU_Exit_Guidance_Document_for_No_Deal_final.pdf) (date of use: 20 May 2020) 24-27.

<sup>7</sup> See Smith & Bull *England and Wales* 294. See also <https://www.bl.uk/magna-carta/articles/britains-unwritten-constitution> (date of use: 31 July 2019); <https://www.ucl.ac.uk/constitution-unit/what-uk-constitution/what-uk-constitution> (date of use: 31 July 2019). Parliament has investigated a written Constitution – for a summary of this investigation see <https://www.parliament.uk/documents/commons-committees/political-and-constitutional-reform/The-UK-Constitution.pdf> (date of use: 31 July 2019).

<sup>8</sup> Cartwright (2016) *CLJ* 271-272 who argues that enforcing consumer law offences, through prosecution or compliance measures, was a lengthy procedure and the remedies obtainable were restricted. The Hampton Report made recommendations to improve the situation. See Hampton <http://www.berr.gov.uk/files/file22988.pdf> (date of use: 16 May 2019) (hereafter Hampton Report). This was followed by the Macrory Review available at <https://restorativejustice.org.uk/sites/default/files/resources/files/Regulatory%20Justice%20Sanctioning%20in%20a%20post-Hampton%20World%201.pdf> (date of use: 16 May 2019). The English and Scottish Law Commissions both recommended that consumer law be simplified and consolidated in a single piece of legislation. See Beale *Chitty on Contracts* vol II 38-195. The Department for Business, Innovation and Skills (now the Department for Business, Energy and Industrial Strategy) requested a report on the simplification and the consolidation of consumer-related law in 2010 and this report also proposed that a single piece of legislation should be enacted to regulate consumer law, goods, and remedies. Howells & Twig-Flessner [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1838/10-1255-consolidation-simplification-uk-consumer-law.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1838/10-1255-consolidation-simplification-uk-consumer-law.pdf) (date of use: 4 July 2019).

law regime identified the two main problems with UK consumer law: the law was not applied and enforced equally and it was unnecessarily complicated.<sup>9</sup>

In 2012, it was decided to follow the EU's Consumer Rights Directive<sup>10</sup> as closely as possible in the new Consumer Rights Act 2015.<sup>11</sup> Proposals for the reform and simplification of consumer law were investigated<sup>12</sup> and the Draft Consumer Rights Bill was proposed in 2013.<sup>13</sup> This was followed by the enactment of the CRA in 2015.<sup>14</sup>

I now consider the CRA, relevant UK Regulations, and EU Directives, together with legislation governing time-share, so as to compare the situation in the UK and the position in South Africa as regards parties under a fixed-term agreement under the CPA.

### 6.3 Legislation

The CRA is a consolidation of legislation designed to provide clarity<sup>15</sup> for both the business community and consumers<sup>16</sup> whilst taking account of technological advances.<sup>17</sup> Earlier UK consumer legislation was complex and fragmented,<sup>18</sup> and

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<sup>9</sup> For the full report see <http://competitionpolicy.ac.uk/documents/107435/107584/file50027.pdf> (date of use: 10 August 2019) especially 21; Explanatory notes para 15, available at <https://www.legislation.gov.uk/ukpga/2015/15/notes> (date of use: 15 June 2020). Also see Beale *Chitty on Contracts* vol II 38-195–38-196, 38-347.

<sup>10</sup> Directive 2011/83/EU of the European Parliament and of the Council on Consumer Rights (known as the Consumer Rights Directive (CRD)) available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0083> (date of use: 13 November 2019). Part of the CRD was introduced in 2012 as the Consumer Rights (Payment Surcharges) Regulations 2012, and the rest came into effect during 2014 as the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

<sup>11</sup> The Consumer Rights Act 2015 (CRA) came into force on different dates, but the majority of its provisions were operative from 1 October 2015. The CRA can be accessed at <http://www.legislation.gov.uk/ukpga/2015/15/contents/enacted> (date of use: 13 November 2019). For a background discussion see <http://www.legislation.gov.uk/ukpga/2015/15/notes/contents> (date of use: 13 November 2019).

<sup>12</sup> Devenney (2018) *JBL* 485-511.

<sup>13</sup> URN: BIS/13/925. See <https://publications.parliament.uk/pa/cm201314/cmpublic/consumer/memo/consumerevidence.pdf> (date of use: 7 September 2019) for evidence on the Bill by interested parties.

<sup>14</sup> The CRA came into force on 1 October 2015, see also n 11 above.

<sup>15</sup> Devenney (2018) *JBL* 489-490.

<sup>16</sup> For the Explanatory Notes on the CRA see [http://www.legislation.gov.uk/ukpga/2015/15/pdfs/ukpgaen\\_20150015\\_en.pdf](http://www.legislation.gov.uk/ukpga/2015/15/pdfs/ukpgaen_20150015_en.pdf) (date of use: 15 May 2019) (hereafter Explanatory Notes); Emery (2015) *Credit Management* 34.

<sup>17</sup> Conway <https://researchbriefings.files.parliament.uk/documents/SN06759/SN06759.pdf> (date of use: 16 May 2019).

<sup>18</sup> Explanatory Notes to the Consumer Rights Act para 5 available at <https://www.legislation.gov.uk/ukpga/2015/15/notes/division/2> (date of use: 16 May 2019) (hereafter Explanatory Notes). Also see Devenney (2018) *JBL* 486-488.

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consisted of some ten Acts, and various regulations and directives.<sup>19</sup> Ironically, the CRA aimed to bring UK consumer legislation in line with EU legislation,<sup>20</sup> and incorporates EU Directives.<sup>21</sup>

The different approaches when naming consumer legislation are interesting as certain countries – eg, South Africa and Singapore – use the term ‘protection’, while the UK chose the term ‘rights’.<sup>22</sup>

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<sup>19</sup> Supply of Goods (Implied Terms) Act 1973; Sale of Goods Act 1979; Supply of Goods and Services Act 1982; Sale and Supply of Goods Act 1994; Sale and Supply of Goods to Consumers Regulations 2002; Unfair Contract Terms Act 1977 (UCTA); Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR); Unfair Terms in Consumer Contracts (Amendment) Regulations 2001; Competition Act 1998; Enterprise Act 2002. See the Explanatory Notes para 8.

<sup>20</sup> See Beale *Chitty on Contracts* vol II 38-003-38-004 for a discussion of the emergence of EU law in UK law, and the early approaches to EU law. The importance of EU law in the UK is ironic in light of the UK’s decision to leave the EU. See Gee et al <https://www.birmingham.ac.uk/Documents/college-artslaw/law/iel/leaving-EU-legal-impact-brexitee-rubini-trybus.pdf> (date of use: 21 June 2019) for a general discussion of the effects of Brexit.

<sup>21</sup> The Directives are: Directive 99/44/EC of the European Parliament and of the Council on certain aspects of the Sale of Consumer Goods and Associated Guarantees available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31999L0044> (date of use: 13 November 2019); Directive 93/13/EEC of the Council on Unfair Terms in Consumer Contracts available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31993L0013&from=EN> (date of use: 15 January 2020); Directive 2011/83/EU of the European Parliament and of the Council on Consumer Rights available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0083&from=EN> (date of use: 15 January 2020); Regulation (EC) No 2006/2004 of the European Parliament and of the Council on Cooperation between National Authorities responsible for the Enforcement of Consumer Protection Laws available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R2006&from=EN> (date of use: 15 January 2020); Regulation (EC) No 765/2008 of the European Parliament and of the Council setting out the requirements for Accreditation and Market Surveillance relating to the Marketing of Products available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:218:0030:0047:EN:PDF> (date of use: 15 January 2020); Directive 2001/95/EC of the European Parliament and of the Council on General Product Safety available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0095&from=EN> (date of use: 15 January 2020); Directive 98/27/EC of the European Parliament and of the Council on Injunctions for the protection of Consumers’ Interests available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31998L0027&from=EN> (date of use: 15 January 2020). Explanatory Notes paras 9 and 10. Also see Giliker (2017) *LS* 78-102.

<sup>22</sup> The difference in terminology used to name legislation is interesting, as the CPA and Singapore consumer legislation (CPFTA) are termed consumer protection legislation, and the UK Act is the Consumer Rights Act. The distinction between consumer protection and consumer rights is emphasised by Andrews. She contends the main difference lies in the way rights on the one hand, and protections on the other, are enforced. A right implies the consumer has full freedom to enforce his or her right or claim where and when he or she chooses, the consumer is not obliged to obtain consent to institute the claim, and the claim is not subject to prior approval. Protection, on the other hand, does not inevitably imply a right and may, for instance, imply that a regulatory body can or must take action and the consumer does not necessarily benefit directly. He or she may, however, benefit indirectly in the long term from action taken by the regulatory body. Therefore, the main difference lies therein that a right effectively empowers a consumer. See in this regard, <http://competitionpolicy.ac.uk/documents/107435/107584/file50027.pdf> (date of use: 10 August

### 6.3.1 *The effect of Brexit on consumer protection legislation in the UK*<sup>23</sup>

The UK voted to leave the EU on 23 June 2016,<sup>24</sup> just one year after approval and commencement of the CRA. In preparation for the event, special draft legislation has been drafted.<sup>25</sup>

Relevant guidance and EU Directives, as well as case law decided by European courts before the official Brexit date are discussed as they form part of UK consumer law until the UK amends the current consumer regime to limit or exclude EU law.<sup>26</sup>

### 6.3.2 *Consumer legislation in the UK*

The aim of the CRA as reflected in the preamble to the Act is,

‘to amend the law relating to the rights of consumers and protection of their interests; to make provision about investigatory powers for enforcing the regulation of traders; to make provision about private actions in competition law and the Competition Appeal Tribunal; and for connected purposes’.<sup>27</sup>

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2019) especially 107-108. Protection normally implies a more passive role for the consumer. For a general discussion see Andrews *Enforcement* 1. Also see the discussion in Ch 4 para 4.3.5.

<sup>23</sup> See [http://www.legislation.gov.uk/ukxi/2019/203/pdfs/ukxi\\_20190203\\_en.pdf](http://www.legislation.gov.uk/ukxi/2019/203/pdfs/ukxi_20190203_en.pdf) (date of use: 3 July 2019). For the EU's perspective of the legal implications of Brexit on the UK, see Gee et al 'Leaving the EU?' available at <https://www.birmingham.ac.uk/Documents/college-artslaw/law/iel/leaving-EU-legal-impact-brexit-gee-rubini-trybus.pdf> (date of use: 12 July 2019).

<sup>24</sup> See Mueller <https://www.nytimes.com/interactive/2019/world/europe/what-is-brexit.html> (date of use: 21 June 2019). For more information and a few discussions or briefings on the unknowns of Brexit see <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8408> (date of use: 30 July 2019); and <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8451> (date of use: 30 July 2019). For a discussion of the possible implications of Brexit on consumer law in the UK see Willett (2018) *CLJ* 179-210.

<sup>25</sup> See [http://www.legislation.gov.uk/ukdsi/2019/9780111180785/pdfs/ukdsi9780111180785\\_en.pdf](http://www.legislation.gov.uk/ukdsi/2019/9780111180785/pdfs/ukdsi9780111180785_en.pdf) (date of use: 6 August 2019). These regulations deal with practical measures to address the shortcomings of EU law that will set in when the UK leaves the EU. See <https://www.gov.uk/eu-withdrawal-act-2018-statutory-instruments/consumer-protection-amendment-etc-eu-exit-regulations-2018> (date of use: 4 July 2019) for links to the regulations and explanatory memorandum, that aim to deal with amendments necessitated by Brexit to provide legislation for the effective operation of such legislation upon Brexit. See [http://www.legislation.gov.uk/ukxi/2019/479/pdfs/ukxi\\_20190479\\_en.pdf](http://www.legislation.gov.uk/ukxi/2019/479/pdfs/ukxi_20190479_en.pdf) (date of use: 6 August 2019), these regulations were made to provide for the effective application of retained EU law after Brexit; [http://www.legislation.gov.uk/ukxi/2019/203/pdfs/ukxi\\_20190203\\_en.pdf](http://www.legislation.gov.uk/ukxi/2019/203/pdfs/ukxi_20190203_en.pdf) (date of use: 6 August 2019) to provide for transitional provisions regarding consumer protection on Brexit. For an indication of the vast number of uncertainties regarding Brexit see <https://beta.parliament.uk/search?q=Brexit> (date of use: 30 July 2019).

<sup>26</sup> Willett (2018) *CLJ* 179-210, 210 argues that the effects of Brexit could probably cause UK consumer law evolving to become more self-interested and self-reliant. For the guidance on practical measures and the Guidance on the functions of the Competitions and Markets Authority after a 'no deal' exit from the EU see [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/786749/EU\\_Exit\\_Guidance\\_Document\\_for\\_No\\_Deal\\_final.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786749/EU_Exit_Guidance_Document_for_No_Deal_final.pdf) (date of use: 20 May 2020) 24-27.

<sup>27</sup> Preamble to the Consumer Rights Act 2015. Beale *Chitty on Contracts* vol II 38-341 highlights four strategies in the CRA: implementation of the Unfair Terms in Consumer Contracts



The role of the CRA is to bring about reform in the field of consumer law in the UK – to clarify and modernise consumer law,<sup>28</sup> and, as stated above, to reconcile UK consumer law with that of the EU.<sup>29</sup>

Before discussing the applicable provisions of the CRA, and UK Regulations, I highlight a few relevant EU Directives.<sup>30</sup>

### 6.3.3 *EU Directives*

EU Directives and EU court rulings are important and form part of UK law.<sup>31</sup> The UK courts are required to interpret and apply EU Directives, and to carry out the terms and purposes of EU Directives and EU rulings in the UK.<sup>32</sup> However, when UK law and the EU Directives and rulings differ or conflict, the courts must apply UK legislation.<sup>33</sup>

Guidance on EU Directives is available on the official website<sup>34</sup> and provides direction on the purposes, aims, and application of the relevant EU Directives which include:<sup>35</sup>

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Regulations; amendment of the Unfair Contract Terms Act 1977; the wide application of Part 1 of the CRA; and, the extension of enforcement measures. Also see Beale *Chitty on Contracts* vol II 38-348-350; see too Ch 4 para 4.2.2.3 and Ch 5 paras 5.3.2.10 and 5.6.

<sup>28</sup> Devenney (2018) *JBL* 485, 490.

<sup>29</sup> Note that from the date of withdrawal of the UK from the EU, EU law will still form part of UK law, and the law derived from EU law will be maintained in the UK, see [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/786749/EU\\_Exit\\_Guidance\\_Document\\_for\\_No\\_Deal\\_final.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786749/EU_Exit_Guidance_Document_for_No_Deal_final.pdf) (date of use: 20 May 2020) for more information. For a summary and suggestions of how the EU law could be applied and interpreted by UK courts, see Andrews *Enforcement* 90-91; Giliker (2017) *LS* 78-102.

<sup>30</sup> For a discussion of all sources of consumer law in the UK, see Andrews *Enforcement* 66-74. These include other and delegated legislation, byelaws, statutory codes of practice, and case law.

<sup>31</sup> Beale *Chitty on Contracts* vol II 38-013.

<sup>32</sup> Beale *Chitty on Contracts* vol II 38-013, 38-344.

<sup>33</sup> See Beale *Chitty on Contracts* vol II 38-013, 38-346. For an example where the court had to do this see *Robertson v Swift* [2014] WLR 3438, specifically paras [30]–[33] for the factors the Appellate Division considered in reaching its decision; Andrews *Enforcement* 90-91.

<sup>34</sup> For example, the Guidance on the Consumer Rights Directive is available at [https://ec.europa.eu/info/law/law-topic/consumers/consumer-contract-law/consumer-rights-directive\\_en](https://ec.europa.eu/info/law/law-topic/consumers/consumer-contract-law/consumer-rights-directive_en) (date of use: 22 January 2020).

<sup>35</sup> The purpose of the Unfair Commercial Practices Directive 2005/29/EC (UCPD) of the European Parliament and of the Council, 11 May 2005 is to regulate unfair commercial practices in member states. See <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005L0029&from=EN> (date of use: 17 July 2019). Unfair commercial practices can include, but are not limited to, misleading, unfair and aggressive advertising and marketing practices as set out in articles 1-8 of the Directive. The Directive aims to ensure consumers are protected from these practices, indirectly also to protect the economy by preserving interests of legitimate competitors, and to promote cross-border activities between member states. The EU Unfair Commercial Practices Directive will not be discussed as it relates more to the public competition sphere of the law with limited effect on the specific consumer

### 6.3.3.1 *Consumer Rights Directive 2011/83/EU*<sup>36</sup>

The Consumer Rights Directive regulates aspects of consumer contracts<sup>37</sup> on pre-contractual information the trader must provide the consumer.<sup>38</sup> This is known as information-based consumer protection as it empowers the consumer by providing him or her with information. Consumer contracts are divided into off-premises contracts,<sup>39</sup> distance contracts,<sup>40</sup> and on-premises contracts, each having its own requirements. The main purpose of the CRD is to ensure high levels of consumer protection.<sup>41</sup>

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contracts that form the subject of this study. The E-Commerce Directive (2003/31/EC) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0031&from=EN> (date of use: 18 July 2019), aims to ensure and regulate the free movement of goods and services, to develop information society services, and to eliminate barriers of division between European nations (art 1). It further aims to stimulate electronic commerce, economic growth and investment, and improve competition (art 2). It is therefore not of direct relevance to this topic, although it applies to consumer law in general in the UK. Directive 1999/44/EC deals with certain aspects of the sale of consumer goods and associated guarantees to ensure a minimum set of rules within the EU, to ensure uniform rules wherever the goods are purchased, and to strengthen consumer confidence. See <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31999L0044&from=EN> (date of use: 10 September 2019). The EU Services Directive 2006/123/EC available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0123&from=EN> (date of use: 18 July 2019), aims to improve and erase barriers to the free movement of services and employment, and the development of service activities, social protection, equality, and to ensure improved employment levels. The EU Services Directive will not be discussed as it addresses the movement of services and employment within the EU, and not with the services provided and contracted for in consumer contracts. The EU Directive 2013/11/EU (hereafter EU Directive on Consumer ADR) deals with ensuring fast and cost-effective dispute resolution of consumer contract disputes within the EU and in the member states' domestic markets.

<sup>36</sup> Hereafter the CRD available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0083&from=EN> (date of use: 17 July 2019). Also see the European Commission, DG Justice Guidance Document available at [https://ec.europa.eu/info/sites/info/files/crd\\_guidance\\_en\\_0.pdf](https://ec.europa.eu/info/sites/info/files/crd_guidance_en_0.pdf) (date of use: 17 July 2019) for further information and guidance on the Directive, its purpose, application, and interpretation.

<sup>37</sup> It is interesting to note that the CRA does not define the term 'consumer contract' but the Competition and Markets Authority (CMA) Unfair Contract Terms Guidance uses the term – eg, at 3 and the heading at 8 of the Guidance where consumer contracts are addressed – and states that the CRA defines the term. See

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/450440/Unfair\\_Terms\\_Main\\_Guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf) (date of use: 22 January 2020). Also see n 59.

However, the term 'contract' is defined in s 3 of Part 1 of the CRA and, therefore, the term contract will be used for the discussion of Part 1 of the CRA. The term consumer contract, which is defined in s 61(3) of Part 2, will be used when discussing Parts 2 and 3 of the CRA. In the rest of the discussion the terms consumer contract and contract are used interchangeably.

<sup>38</sup> Articles 5 and 6; Links to the Consumer Rights Directive, Guidance on the Application of the Directive, and various other related documents can be found at [https://ec.europa.eu/info/law/law-topic/consumers/consumer-contract-law/consumer-rights-directive\\_en](https://ec.europa.eu/info/law/law-topic/consumers/consumer-contract-law/consumer-rights-directive_en) (date of use: 16 August 2019).

<sup>39</sup> Article 21.

<sup>40</sup> Article 20.

<sup>41</sup> Article 3.

This Directive is important from the perspective of the consumer in the UK as it was imported into the UK consumer law by way of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations (CCRs) in 2013.<sup>42</sup> These provisions entitle a consumer to cancel or withdraw from a consumer contract in prescribed circumstances.<sup>43</sup>

### 6.3.3.2 *Unfair Contract Terms Directive 93/13/EEC*<sup>44</sup>

The purpose of the EU's UCTD is to regulate the provisions on unfair terms in contracts between traders and consumers.<sup>45</sup> These provisions were inserted in Part 2 of the CRA and will be discussed or referred to where relevant in this thesis as the directive entitles consumers to cancel or withdraw from consumer contracts in prescribed circumstances.<sup>46</sup>

### 6.3.3.3 *EU Sales and Guarantees Directive 1999/44/EC*

The Sales and Guarantees Directive<sup>47</sup> aims to provide a uniform high level of consumer protection by ensuring that goods sold conform to contractual specifications, and entitles consumers to make use of a rebuttable presumption, which simply put implies that without restricting freedom of contract, the goods conform to the contract in the 'most common situations'.<sup>48</sup> In addition, the directive proposes certain minimum protective measures in consumer contracts to ensure that goods conform to contract, and to provide that the seller is directly liable to the consumer when goods do not conform to contract.<sup>49</sup> The SGD is of interest to this study as it protects consumers against contractual exploitation. The provisions of this directive were implemented in Chapter 1 of Part 1 of the CRA.

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<sup>42</sup> SI 2013/3134, (CCR's) available at <http://www.legislation.gov.uk/ukxi/2013/3134/introduction/made> (date of use: 21 August 2019); Practice Note Overview 2.

<sup>43</sup> See Part 3 of the Regulations.

<sup>44</sup> Hereafter the UCTD available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31993L0013&from=EN> (date of use: 17 July 2019). For guidance on the Directive see [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XC0927\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XC0927(01)&from=EN) (date of use: 20 March 2020).

<sup>45</sup> Article 1 of the UCTD. Note that art 1.2 excludes mandatory legislative provisions from the operation of the Directive.

<sup>46</sup> See para 6.3.4.3 below.

<sup>47</sup> Hereafter the SGD available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31999L0044&from=EN> (date of use: 18 July 2019). Note that this Directive will be replaced in January 2022 by Directive (EU) 2019/771. See [https://ec.europa.eu/info/law/law-topic/consumers/consumer-contract-law/consumer-sales-and-guarantees-directive\\_en](https://ec.europa.eu/info/law/law-topic/consumers/consumer-contract-law/consumer-sales-and-guarantees-directive_en) (date of use: 20 March 2020).

<sup>48</sup> The presumption does not limit or restrict freedom of contract but is used to establish whether there is a lack of conformity considering, cumulatively and inter alia, the reasonable expectations of the consumer and whether the goods are new or second-hand. See art 8 of the EU Sales and Guarantees Directive available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31999L0044&from=EN> (date of use: 18 July 2019).

<sup>49</sup> See arts 1-9 which are particularly useful for protecting consumers. These provisions would benefit consumers in s 14 agreements under CPA.

Having identified the most relevant EU Directives applicable in UK consumer law, I can now turn to a discussion of the relevant sections of the CRA.

#### 6.3.4 Consumer Rights Act (CRA)

##### 6.3.4.1 Introduction

The CRA consists of three parts. Part 1 regulates consumer contracts for goods, services, and digital content.<sup>50</sup> Part 2 deals with unfair contract terms,<sup>51</sup> and Part 3 regulates general aspects and how the CRA is enforced.<sup>52</sup> Because section 1(3) of the CRA distinguishes between three types of contract – goods contracts; service contracts; and digital content contracts – any of Chapters 2, 3 or 4 of the CRA may apply.<sup>53</sup>

The Department for Business, Innovation, and Skills<sup>54</sup> in the UK has prepared Explanatory Notes to the CRA<sup>55</sup> which are useful when read in conjunction with the CRA to assist in interpreting and understanding the Act. The explanatory notes do not form part of the CRA and were not drafted or endorsed by Parliament. They are intended merely to assist and guide the interpretation and application of the CRA.<sup>56</sup>

The guidance on the CRA and applicable regulations is available on the government's website,<sup>57</sup> and consumers and traders can visit the website, enter the name of the Act or regulations they need guidance on, and a list of guides appears.<sup>58</sup> These guides are in simple language and provide guidance to traders and consumers alike on aspects of the CRA and applicable regulations. The guidance

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<sup>50</sup> Andrews *Enforcement* 174; Beatson et al *Anson's Law of Contract* 160-161; Explanatory Notes 2.

<sup>51</sup> Andrews *Enforcement* 176, 223-225; Explanatory Notes 2.

<sup>52</sup> Andrews *Enforcement* 176-177; Beale *Chitty on Contracts* vol II 38-336; Explanatory Notes 2.

<sup>53</sup> Section 1(3) of the CRA provides:

'(3) Any of Chapters 2, 3 and 4 may apply to a contract –  
(a) if it is a contract for the trader to supply goods, see Chapter 2;  
(b) if it is a contract for the trader to supply digital content, see Chapter 3 (also, subsection(6));  
(c) if it is a contract for the trader to supply a service, see Chapter 4 (also, subsection (6)).'

<sup>54</sup> Now known as the Department for Business, Energy and Industrial Strategy.

<sup>55</sup> See <http://www.legislation.gov.uk/ukpga/2015/15/notes> (date of use: 21 August 2019).

<sup>56</sup> Introduction to the Explanatory Notes available at [http://www.legislation.gov.uk/ukpga/2015/15/pdfs/ukpgaen\\_20150015\\_en.pdf](http://www.legislation.gov.uk/ukpga/2015/15/pdfs/ukpgaen_20150015_en.pdf) (date of use: 12 July 2019).

<sup>57</sup> The official government website is <http://www.legislation.gov.uk/ukpga/2015/15/contents/enacted> (date of use: 20 January 2020). The explanatory notes on the CRA can also be accessed on this site.

<sup>58</sup> A site for businesses (and consumers) to access information is <https://www.businesscompanion.info/> (date of use: 12 July 2019). The site aimed at consumers is <https://www.citizensadvice.org.uk/Global/Public/Campaigns/cra/ConsumerRightsSummary-GoodsOL.pdf> (date of use: 20 January 2020).

is not law, but reflects the views of the Competition and Markets Authority (CMA)<sup>59</sup> on the intention of the legislature.

Before discussing the CRA, I mention the relevant UK regulations as they are referred to in the discussion of the sections of the CRA:

- Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134);<sup>60</sup>
- Consumer Rights (Payment Surcharges) Regulations 2012 (SI 2012/3110);<sup>61</sup>
- Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277);<sup>62</sup>
- Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2133);<sup>63</sup>
- Provision of Services Regulations 2009 (SI 2009/2999);<sup>64</sup> and
- Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (SI 2015/542).<sup>65</sup>

#### 6.3.4.2 Part 1 of the CRA

Part 1 of the CRA deals with the concepts and terms used in the Act, as well as providing for the clarification of consumer rights relating to goods, services, and digital content.<sup>66</sup>

Section 1 provides that Part 1 of the CRA will apply when a trader and consumer enter into an agreement for the trader to supply goods, digital content, or services, if the agreement is a contract.<sup>67</sup> The contract can be in writing, oral, or implied, or a combination of these, depending on circumstances.<sup>68</sup> The section further provides

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<sup>59</sup> CMA Unfair Contract Terms Guidance for Business available at <https://www.businesscompanion.info/sites/default/files/CRA-Goods-Guidance-for-Business-Sep-2015.pdf> (date of use: 20 March 2020). The aim of the CMA is to promote competition for the benefit of consumers. For more information on the CMA see <https://www.gov.uk/government/organisations/competition-and-markets-authority/about> (date of use: 20 March 2020). See n 37.

<sup>60</sup> Hereafter the CCRs available at <http://www.legislation.gov.uk/uksi/2013/3134/contents/made> (date of use: 13 November 2019).

<sup>61</sup> Hereafter PSR available at <http://www.legislation.gov.uk/uksi/2012/3110/contents/made> (date of use: 15 January 2020).

<sup>62</sup> Hereafter CPUT available at <http://www.legislation.gov.uk/uksi/2008/1277/contents> (date of use: 15 January 2020).

<sup>63</sup> Hereafter E-Commerce Regulations available at <http://www.legislation.gov.uk/uksi/2002/2133/made> (date of use: 15 January 2020).

<sup>64</sup> Hereafter PSRs available at [http://www.legislation.gov.uk/uksi/2009/2999/pdfs/uksi\\_20092999\\_en.pdf](http://www.legislation.gov.uk/uksi/2009/2999/pdfs/uksi_20092999_en.pdf) (date of use: 15 January 2020).

<sup>65</sup> Hereafter ADR Regulations available at <http://www.legislation.gov.uk/uksi/2015/542/contents/made> (date of use: 15 January 2020).

<sup>66</sup> Beale *Chitty on Contracts* vol II 38-446; Explanatory Notes para 22.

<sup>67</sup> For an explanation of the term 'contract', see Explanatory Notes para 31.

<sup>68</sup> Explanatory Notes para 30.

that Chapter 2 of Part 1 of the CRA applies to contracts for the supply of goods. Chapter 3 of Part 1 provides for the supply of digital content, and Chapter 4 of Part 1 applies in respect of the supply of services. One, two or all three of these chapters may be applicable depending on the nature of the agreement.<sup>69</sup> Certain mixed contracts are dealt with separately, for instance, section 15 deals with goods and installation, and section 16 provides for the supply of goods and digital content.

Section 2 deals with the definitions of key words in the CRA, and a few important terms relevant to this discussion and contracts, specifically fixed-term agreements in terms of section 14 of the CPA, will now be highlighted. After this, the provisions and relevant aspects of Part 1 are discussed, before moving on to analyse the pertinent aspects of Part 2 of the CRA.

#### 6.3.4.2.1 Consumer

Consumer<sup>70</sup> ‘means an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession’.

The word ‘individual’ implies a natural person,<sup>71</sup> and therefore companies and limited liability partnerships<sup>72</sup> are excluded from the definition.<sup>73</sup> When a sole trader or a partner in a partnership contracts in his or her personal capacity as consumer, he or she can be regarded as a consumer, depending on the purpose of the transaction in question.<sup>74</sup> In addition, a trader in the ordinary sense of the word, can on occasion be regarded as a consumer when, in other transactions he or she is in a ‘weaker’ position compared to the trader he or she is dealing with.<sup>75</sup> When a group of consumers contract together, every member of the group can enforce his or her rights, or the person who acted on behalf of the group can enforce the rights on

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<sup>69</sup> Explanatory Notes para 32.

<sup>70</sup> Section 2(3). However, when a legal person enters into an arbitration agreement for consumer purposes it can make use of the unfair terms provisions in the CRA. Sections 89-91 of the Arbitration Act 1996. See *Heifer International Inc v Helge Christiansen and Others* [2007] EWHC 3015 (TCC) (hereafter *Heifer*), accessed on Westlaw 2007 WL 4610568. This exception is also subject to the sum in dispute being above a certain minimum amount as specified in the relevant legislation. Beale *Chitty on Contracts* vol II 38-038.

<sup>71</sup> See Beale *Chitty on Contracts* vol II 38-031.

<sup>72</sup> A limited liability partnership is a partnership that is officially registered under the Limited Liability Partnerships Act of 2000, and has separate legal personality and limited liability for the partners. The partners in a limited liability partnership are taxed individually. See <https://www.pearse-trust.ie/blog/bid/67579/uk-limited-liability-partnerships-key-features-benefits-explained> (date of use: 20 March 2020). Also see the government website which provides guidance and explains the concept including how to set up and run such a partnership – <https://www.gov.uk/guidance/set-up-and-run-a-limited-liability-partnership-llp> (date of use: 20 March 2020).

<sup>73</sup> Note that the definition of consumer in the CRA is wider than that in EU law. See Giliker (2017) LS 78, 82-83; Beale *Chitty on Contracts* vol II 38-031, 38-038-38-040.

<sup>74</sup> *Benincasa v Dentalkit Srl* (Case C-269/95) EU:C:1997:337. Also see Andrews *Enforcement* 18-20; Beale *Chitty on Contracts* vol II 38-034.

<sup>75</sup> Beale *Chitty on Contracts* 32 ed, 2<sup>nd</sup> cumulative supplement 38-032; *Costea v Volksbank România SA* (C -110/14) 23 April 2015 paras [20]-[32].

behalf of the group.<sup>76</sup> When a transaction is mainly for consumer use, for instance, a sole trader buys a microwave oven for use in his or her apartment, and uses it once a week when working from home to warm food, he or she will still be regarded as a consumer in respect of the transaction.<sup>77</sup>

The principles that have emerged to establish whether a person acts outside of the scope of his or her trade, business, craft, or profession are:<sup>78</sup>

- If the consumer bought the item for the purpose of his or her private consumption and use, he or she will be regarded as a consumer for the specific transaction.<sup>79</sup>
- A person who bought a house and renovated it for his or her family to live in, was found not be acting for his or her trade, business, craft, or profession,<sup>80</sup> although the house increased in value and, as such, there was financial benefit involved.<sup>81</sup> If the house had been bought as part of an investment portfolio, however, the purchaser would not have been regarded as a consumer.<sup>82</sup> The courts will establish the intention of the person when entering into the transaction.<sup>83</sup>
- The intended use of a product can change, and a product a consumer originally purchased for individual use, can in future be used for business purposes.<sup>84</sup>
- The mere fact that an individual is an expert, or well established in a specific field does not imply he or she cannot be or remain a consumer.<sup>85</sup>
- When a consumer purchases an item for mixed purposes, the court will try to establish whether the private use of the item is predominant.<sup>86</sup>

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<sup>76</sup> For instance, when a group of friends buy theatre tickets together. Explanatory Notes para 36.

<sup>77</sup> See the examples in Explanatory Notes para 36. It further appears that the UK definition of consumer is wider than that in EU law, see Practice Note Overview 6. For a discussion of the EU law see the Practice Note Overview 7; EU law looks at the predominant purpose of the transaction, see *Costea v SC Volksbank România SA* (Case C-110/14) EU:C:2015:538. Also, see Andrews *Enforcement* 20-23.

<sup>78</sup> Beale *Chitty on Contracts* vol II 38-038-38-039; Devenney (2018) *JBL* 494-495.

<sup>79</sup> Beale *Chitty on Contracts* vol II 38-036-38-037; *Standard Bank London Ltd v Apostolakis* [2000] IL Pr 766 para [15]; *Overy v Paypal (Europe) Ltd* [2012] EWHC 2659 (QB) para [180].

<sup>80</sup> These activities will be referred to as 'business purposes' for ease of reference and brevity.

<sup>81</sup> *Heifer* 35.

<sup>82</sup> *Heifer* 35.

<sup>83</sup> Practice Note Overview 11.

<sup>84</sup> Practice Note Overview 14.

<sup>85</sup> *Schrems v Facebook Ireland Ltd* (Case C-498/16) EU:C:2018:37 paras [25]–[41]. This case is also important because it emphasised the value of a uniform definition of consumer in the EU jurisdiction. For a table of cases decided on whether a purchaser's purpose fell outside of his business, see Practice Note Overview 11-13.

<sup>86</sup> However, the position before enactment of the CRA was not clear as others required the secondary use to be negligible, see Andrews *Enforcement* 20-21. Also see *Gruber v Bay Wa AG* C-464/01 [2005] ECR I-439; Beale *Chitty on Contracts* vol II 38-033. The test is now set at 'wholly or mainly' as in the definition of consumer in s 2 of the CRA.

Further enquiry into the concept of the consumer is necessary when establishing who qualifies as the 'average consumer'. This is pertinent when deciding on the prominence<sup>87</sup> of a term in an agreement when the consumer agreement is tested for fairness.<sup>88</sup> The benchmark is whether the average consumer would have been aware of the meaning and implications of this term when entering into the agreement in question.<sup>89</sup> Section 64(5) of the CRA defines an average consumer as 'a reasonably well-informed, observant and circumspect' person. The test used to establish who the average consumer is, is an objective one. In *The Office of Fair Trading v Ashbourne Management Services Ltd*<sup>90</sup> the court described the average consumer as 'a member of the public interested in using a gym which is not a high end facility and who may be attracted by the relatively low monthly subscriptions'.<sup>91</sup> This definition is not particularly helpful, because it only indicates that the consumer is interested in joining a gym, and is neither rich nor poor.<sup>92</sup> Further guidance on the term is provided in the CMA Unfair Terms Guidance.<sup>93</sup>

Vulnerable consumers are dealt with in regulation 2(5) of CPUT. Criteria include, for example, physical and mental disabilities and age.<sup>94</sup> The concept of vulnerable consumers is still a work in progress in both the UK and the EU.<sup>95</sup>

When an individual purchases a second-hand item at an auction he or she attends personally, he or she will not be a consumer in terms of section 2(5) of the CRA.<sup>96</sup> However, because the CCRs still apply, and because the consumer will be protected by the CRD provisions in the CRA, he or she will be able to make use of these additional protective measures.<sup>97</sup> Further protection is also provided in Part 2 of the CRA which deals with unfairness.<sup>98</sup>

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<sup>87</sup> The 'prominence'-requirement is new to the CRA, and the purpose of deciding whether a term or condition is prominent or not, is to establish whether the term was brought to the consumer's attention in a way that would enable the 'average consumer' to be aware of it, see Practice Note Overview 88.

<sup>88</sup> See para 6.3.4.3. This is used for purposes of Part 2 of the CRA.

<sup>89</sup> Beale *Chitty on Contracts* vol II 38-041-38-043.

<sup>90</sup> [2011] EWHC 1237 (Ch) (hereafter *Ashbourne*). For a discussion of this judgment see para 6.6.1 below.

<sup>91</sup> *Ashbourne* 8.

<sup>92</sup> Also see Andrews *Enforcement* 29-30; *The Office of Fair Trading v Abbey National plc* [2010] 1 AC 696 para [113]; Beale *Chitty on Contracts* vol II 38-041.

<sup>93</sup> See Practice Note Overview 88-90 for more information. Guidance 2.63-2.65. The CMA guidance is not the law, but merely provides guidance in the form of the CMA's views on the intention of the legislature.

<sup>94</sup> See <https://ec.europa.eu/transparency/regdoc/rep/2/2009/EN/2-2009-1666-EN-F-0.Pdf> (date of use: 15 August 2019) 28-30; Andrews *Enforcement* 27-29.

<sup>95</sup> Practice Note Overview 80; Andrews *Enforcement* 29. This differs significantly from the position in South Africa where this term is well-defined and important – see the discussion in Ch 4 paras 4.2.3.2, 4.2.3.7 and 4.3.5, and the position in Singapore, Ch 5 paras 5.3.2.2, 5.3.2.9.

<sup>96</sup> See s 45 of the CPA regarding auctions.

<sup>97</sup> For instance, the goods must comply with information provided prior to entering into the agreement, and the passing of risk in respect of the goods.

<sup>98</sup> See the discussion in para 6.3.4.3.



A consumer who purported to act as a trader was denied consumer protection in terms of the UCTA. In *Gruber v Bay Wa*<sup>99</sup> the European Court of Justice<sup>100</sup> decided where a consumer creates the impression that he or she is acting for business purposes, he or she will not be regarded as a consumer, even if he or she would have been regarded as a consumer in normal circumstances.<sup>101</sup>

The definition of consumer, and its interpretation are relevant when a business or sole trader wants to make use of the additional protective measures that apply to individual consumers. It could also be important to an individual who bought an item for use both in his or her business and for personal use. The other side of the coin is when a trader wants to rely on the lack of protective measures for businesses when he or she is of the view that the consumer was not an individual but acting for business purposes. The burden of proof that a person was not acting as a consumer rests with the trader who wishes to rely thereon.<sup>102</sup>

There are different types of contract: contracts for goods; contracts for services; and contracts for digital content. These contracts are further divided into on-premises contracts,<sup>103</sup> distance contracts,<sup>104</sup> and off-premises<sup>105</sup> contracts.<sup>106</sup> It is important to distinguish between these different agreements as the trader is obliged to provide pre-contractual information to the consumer, and the requirements of the type of information and the way it is provided differs depending on where the contract was concluded.<sup>107</sup> If the required pre-contractual information is not provided, or not provided correctly, the consumer may have a right to cancel or withdraw from the agreement.<sup>108</sup> Courts in the UK have to consider whether information requirements

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<sup>99</sup> AG C-464/01 [2005] ECR I-439 [51] (hereafter *Gruber*).

<sup>100</sup> The role of the European Court of Justice is to ensure EU law is interpreted and applied consistently in every EU country so ensuring countries and EU institutions abide by EU law. For further information see [https://europa.eu/european-union/about-eu/institutions-bodies/courtjustice\\_en](https://europa.eu/european-union/about-eu/institutions-bodies/courtjustice_en) (date of use: 13 November 2019).

<sup>101</sup> Beale *Chitty on Contracts* vol II 38-034; *Gruber* para [51]; and the obiter remarks in *Overy* para [180]. The CPA contains no similar provision. This could be regarded as a *lacuna* in the CPA, as it is part of the responsabilisation of the consumer. Although estoppel as a defense can be raised against such a consumer in South Africa – the CPA should preferably have addressed this issue. Training, information, and education of consumers in consumer-related matters can be regarded as consumer responsabilisation. See Evans et al available at <https://journals.sagepub.com/doi/pdf/10.1177/0308518X17694030> (date of use: 28 March 2020); Morrison available at <https://pdfs.semanticscholar.org/65ab/b923bd84a841d876c50b049386b5c95c163d.pdf> (date of use: 28 March 2020).

<sup>102</sup> Section 2(4) of the CRA; Practice Note Overview 8; Macdonald & Atkins *Law of Contract* 219; Beale *Chitty on Contracts* vol II 38-045.

<sup>103</sup> Beale *Chitty on Contracts* vol II 38-085.

<sup>104</sup> Beale *Chitty on Contracts* vol II 38-081.

<sup>105</sup> Beale *Chitty on Contracts* vol II 38-076-38-080.

<sup>106</sup> Regulation 5 CCRs; see the definitions.

<sup>107</sup> This aspect is relevant for the fairness test in Part 2 of CRA.

<sup>108</sup> For a full discussion of the information, requirements for the different types of contract, and the consequences of non-adherence, see Beale *Chitty on Contracts* vol II 38-055-38-144; Practice Note Overview 3.

have been met, and if not, what the consequences of such non-compliance are for the consumer.<sup>109</sup>

#### 6.3.4.2.2 *Trader*

Trader ‘means a person acting for purposes relating to that person’s trade, business, craft or profession, whether acting personally or through another person acting in the trader’s name or on the trader’s behalf.’<sup>110</sup>

The term ‘business’ is used in the definition and relevant in the discussion of trader,<sup>111</sup> and includes activities of a government department or a local or public authority.<sup>112</sup> Even not-for-profit organisations can be regarded as traders when they conduct trade or run a charity shop to collect funds.<sup>113</sup>

The European Court of Justice, when deciding on the definition of trader in the Unfair Commercial Practices Directive 2005/29/EC (UCPD), has held that the definition of trader should be determined in relation to the ‘related but diametrically opposed concept of “consumer”’.<sup>114</sup> This description does not provide much clarity or practical guidance. What the court apparently intended was that if the purpose of the transaction is not outside of that individual’s business, it must be a purpose within the scope of his business.<sup>115</sup>

It is also relevant to establish when an individual trading online with other individuals will become a trader. In all probability, he or she would become a trader when a substantial part of his or her income is derived from such activity.<sup>116</sup> The European Court of Justice confirmed this in *Komisia za Zashtita na Potrebitelite v Kamenova*.<sup>117</sup> The definition of trader in the CRA does not require the business activity to be regular.<sup>118</sup>

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<sup>109</sup> This is by analogy to the EU decision of *Radlinger v Finway a.s.* C-377/14 21 April 2016 paras [63]–[67] (hereafter *Radlinger*); Beale *Chitty on Contracts* 2<sup>nd</sup> cumulative supplement 38-063A.

<sup>110</sup> Definition in s 2 of the CRA.

<sup>111</sup> Beale *Chitty on Contracts* vol II 38-047.

<sup>112</sup> Definition in s 2 of the CRA.

<sup>113</sup> Explanatory Notes para 35. This is similar to the position in South Africa in s 5(6) of the CPA. Although the definition of transaction in the CPA requires consideration, s 5(6) of the CPA provides that it is not always a requirement. See Barnard & Botha (2018) *SA Merc LJ* 235-250.

<sup>114</sup> *BKK Mobil Oil Körperschaft des öffentlichen Rechts v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV* (Case C-59/12) EU:C:2013:634 (hereafter *Mobil Oil*) para [33].

<sup>115</sup> Practice Note Overview 9.

<sup>116</sup> Commission UCPD Guidance available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016SC0163&from=EN> (date of use: 16 August 2019) para 2.1.

<sup>117</sup> (Case C-105/17) EU:C:2018:808 paras [36]–[45] (hereafter *Kamenova*).

<sup>118</sup> Case law under earlier legislation suggests that this was previously the case. See *Davies v Sumner* [1984] 1 WLR 1301, 1305. See Ch 4 paras 4.2.3.6.1 for a discussion of this aspect in South Africa.

When a trader acts through an intermediary or makes use of subcontractors, he or she remains liable for the due and proper performance of the contract.<sup>119</sup> Online platforms can also be regarded as traders (for purposes of unfair commercial practices) when they act for purposes related to their business and charge commissions on transactions between traders and users or purchasers.<sup>120</sup> Examples of these platforms are eBay, Amazon, Uber, Airbnb, and Booking.com.<sup>121</sup> These traders have to be assessed on a case-by-case basis and the test is whether the platforms charge a commission or derive income from targeted advertising.<sup>122</sup> In addition, it should be established whether the services provide a platform for business-to-consumer transactions.<sup>123</sup>

A trader acting for an individual who sells or supplies goods on behalf of individuals, for instance when he or she sells consignment goods<sup>124</sup> on behalf of an individual, has been regarded as the seller by the European Court of Justice, when the trader did not disclose this fact to the purchaser.<sup>125</sup> An analogy could be drawn to reach the same conclusion in connection with a trader in terms of the CRA when not disclosing the full facts to a consumer.<sup>126</sup> Therefore, traders should be careful to disclose all relevant facts to consumers or risk being held liable by the consumer.<sup>127</sup>

Most of the UK case law relating to the definition of trader, was decided under previous legislation; it however remains relevant as courts still consult those decisions for guidance.<sup>128</sup>

### 6.3.4.2.3 Goods

Goods<sup>129</sup> 'means any tangible movable items, but that includes water, gas and electricity if and only if they are put up for supply in a limited volume or set quantity.' Land is not included in this definition.<sup>130</sup> Certain specified contracts, for instance, for the supply of cash, goods sold in execution, pledges, mortgages, charges, and other

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<sup>119</sup> Explanatory Notes para 35.

<sup>120</sup> See <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0163&from=EN> (date of use: 5 July 2019) the UCPD Guidance 109-111.

<sup>121</sup> UCPD Guidance 110.

<sup>122</sup> UCPD Guidance 110.

<sup>123</sup> UCPD Guidance 111.

<sup>124</sup> Consignment goods are goods that do not belong to the trader who sells or holds them, but the trader generally earns a commission or fee for the sale. See <https://www.accountingtools.com/articles/2017/5/5/consigned-goods> (date of use: 12 July 2019).

<sup>125</sup> *Wathelet v Garage Bietheres & Fils SPRL* (Case C-149/15) EU:C:2016:840 paras [28]–[30], [45].

<sup>126</sup> Beale *Chitty on Contracts* 2<sup>nd</sup> cumulative supplement 38-052A; Practice Note Overview 10; UCPD Guidance 114.

<sup>127</sup> This is similar to s 27(1)(a)(ii) of the CPA where the intermediary (trader) must disclose the prescribed information to any person to whom he offers to supply services, or goods performed or supplied by a third person.

<sup>128</sup> For further information on when a person/business will be regarded as a trader see the table of case law in Practice Note Overview 11-13.

<sup>129</sup> Section 2(8) CRA.

<sup>130</sup> Only movable items are included in the definition in s 2 of the CRA. Practice Note Overview 15.

forms of security are excluded from the definition of goods for the purpose of Chapter 2 of the CRA.<sup>131</sup>

Chapter 2 of Part 1 of the CRA does not apply to these excluded contracts,<sup>132</sup> but does to all other goods, digital content, and services.<sup>133</sup> The goods in question can be sold, hired, or transferred, and can be the object of hire purchase agreements or conditional sales agreements.<sup>134</sup>

Although 'delivery' is not defined in section 2 of the CRA, it will be briefly discussed as it is relevant to the discussion of goods.

#### 6.3.4.2.4 *Delivery of goods*

Goods must be delivered within 30 days after conclusion of the contract when there is no specific agreement as to the time or period of delivery.<sup>135</sup> Parties are, however, free to negotiate and contract for a date or time for delivery which could be within, or after the prescribed 30 day period.<sup>136</sup>

Section 28 regulates the delivery of goods. Section 28(6)<sup>137</sup> is relevant to this discussion as it provides that the consumer may terminate the agreement when the trader has refused to deliver the goods, or delivery has not taken place in circumstances where time was of the essence. There is no identical provision in the CPA, and such a provision would greatly benefit the consumer in South Africa under

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<sup>131</sup> Section 3(3) CRA; Practice Note Overview 15.

<sup>132</sup> Practice Note Overview 15. For instance, the lease of immovable property will be excluded, but the hire of tangible movables will be covered by Part 1 of the CRA.

<sup>133</sup> However, Part 2 of the CRA which relates to fairness, applies to all contracts concluded between traders and consumers save for contracts of employment or apprenticeship. See ss 61(1) and 61(2) CRA.

<sup>134</sup> Practice Note Overview 15.

<sup>135</sup> Section 28(3) and (4) of the CRA. Traders should not leave delivery until the end of the prescribed period if it can take place before this as this could cause an unnecessary delay to the consumer.

<sup>136</sup> Section 28(7) of the CRA provides that the consumer may specify a period for delivery that is appropriate in the given circumstances. See Practice Note Overview 24. Also, see Commission Guidance on CRD for more information. For more information on delivery by instalments, see s 26(1) of the CRA; CMA Unfair Terms Guidance 5.36.3; reg 30(4) of the CCRs for the consumer's cancellation rights for instalments. See the Department for Business Energy and Industrial Strategy's Guidance for principles and charges regarding deliveries available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/337754/bis-14-973-Statement-of-principles-for-parcel-deliveries.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/337754/bis-14-973-Statement-of-principles-for-parcel-deliveries.pdf) (date of use: 6 August 2019) and <https://www.businesscompanion.info/printpdf/en/quick-guides/goods/delivery-charges> (date of use: 6 August 2019).

<sup>137</sup> Section 28(6), 'If the circumstances are that –

- (a) the trader has refused to deliver the goods,
- (b) delivery of the goods at the agreed time or within the agreed period is essential taking into account all the relevant circumstances at the time the contract was entered into, or
- (c) the consumer told the trader before the contract was entered into that delivery in accordance with subsection (3), or at the agreed time or within the agreed period, was essential, then the consumer may treat the contract as at an end.'

the circumstances in section 14(2)(b)(i)(bb).<sup>138</sup> The consumer would then be able to cancel the agreement without notice, without being liable for any amounts owed up to date of cancellation and would also not be liable for a cancellation penalty.

There are a variety of remedies available to the consumer for late delivery, and the trader may not exclude these remedies as the practice of excluding remedies for late delivery is blacklisted, and therefore, prohibited.<sup>139</sup>

#### 6.3.4.2.5 Services

Chapter 4 of Part 1 (on contracts for goods, digital content, and services) of the CRA applies to services. Although services are not defined in the CRA, section 48 states which contracts are covered by Chapter 4 of Part 1. Section 48(4) provides that a contract to which Chapter 4 applies is referred to as a contract to supply a service. Section 48(1) sets out a general catch-all clause providing that Chapter 4 applies to 'a contract for a trader to supply a service to a consumer'. Section 48(2) contains certain exclusions, for instance, Chapter 4 does not apply to a contract of employment or apprenticeship. In terms of section 48(3) Chapter 4 also does not apply to a gratuitous contract subject to Scots law.

#### 6.3.4.2.6 Digital content

Digital content<sup>140</sup> means 'data which are produced and supplied in digital form'. Part 1 of the CRA will only apply to digital content for payment by consumers.<sup>141</sup> This includes digital content such as a gift voucher, a token, or virtual currency, and is not limited to traditional forms of data like cellphone data, airtime or internet data from an internet service provider.<sup>142</sup> This is subject to the condition that where the digital content is provided free of charge with goods or services, the consumer is liable for payment in respect of the goods or services part of the contract.<sup>143</sup>

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<sup>138</sup> See the discussion in Ch 4 para 4.2.3.7.7. There is also no express provision to this effect in the CPFTA in Singapore.

<sup>139</sup> Practice Note Overview 25. South Africa has similar provisions regarding delivery in section 18(3) of the CPA which provides that the goods delivered must correspond to the description or sample provided by the supplier. Section 19 of the CPA regulates the consumer's rights regarding delivery of goods, but does not contain a provision identical to s 28(6) of the CRA. Section 19(6) provides a remedy when the supplier tenders delivery of the goods, but when the supplier does not tender delivery, or does not perform at all, the consumer is at a disadvantage. See the discussion in Ch 4 para 4.2.3.7.7.

<sup>140</sup> Section 2(9) of the CRA.

<sup>141</sup> Section 33(1) of the CRA.

<sup>142</sup> Practice Note Overview 15. It should be noted that software is regarded as a sale of goods for purposes of the Commercial Agents (Council Directive) Regulations 1993 (SI 1993/3053), although software is not regarded as goods for purposes of the CRA. Beale *Chitty on Contracts* 2<sup>nd</sup> cumulative supplement 38-452. This differs from the position in South Africa where the definition of goods also covers digital content, see Ch 4 para 4.2.3.6.3.

<sup>143</sup> Section 33(2).

#### 6.3.4.2.7 Mixed contracts

Where a contract provides for a mixture of the sale of goods, services, and digital content, the goods provisions will apply to the parts of the agreement dealing with goods. The services provisions will apply to the part of the agreement dealing with services, and the digital content part of the CRA will apply to the part of the agreement dealing with digital content.<sup>144</sup> An example of a mixed contract is the agreement to purchase a mobile phone where there is also a service agreement, and digital content in the form of broadband services.<sup>145</sup>

Mixed-content contracts are subject to the following rules:<sup>146</sup>

- When the consumer purchases goods that require installation,<sup>147</sup> the goods will not conform to the contract when:
  - ‘the installation forms part of the agreement; and
  - the goods must be installed by the trader, or under his responsibility; and
  - the goods are installed incorrectly.’<sup>148</sup>
- When the consumer purchases digital content and the digital content does not conform to the contract specifications, for instance, where there are statutory requirements for adequate quality,<sup>149</sup> the consumer will have the statutory remedies in section 16 at his or her disposal.<sup>150</sup>
- Where the consumer purchases goods that must be manufactured or produced, the contract is regarded as a sales contract, and the provisions pertaining to sales contracts will apply.<sup>151</sup>
- Where the consumer purchases goods and the trader must deliver the goods, the agreement is only regarded as a contract for the purchase of goods, and not as two contracts – one for the purchase of goods, and another separate contract for their delivery.<sup>152</sup> However, there are separate provisions that govern the delivery of goods, and remedies for late delivery of goods that will apply.<sup>153</sup>
- When the consumer purchases digital content and the trader has to provide related services, for example he or she must transmit the content

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<sup>144</sup> Section 1(4)-1(6) of the CRA, as well as ss 15 and 16 of the CRA.

<sup>145</sup> For an interesting discussion and comparison of mobile contracts see 127- 131 of the report available at <http://competitionpolicy.ac.uk/documents/107435/107584/file50027.pdf> (date of use: 13 August 2019).

<sup>146</sup> Mixed contracts are provided for in s 3(7) of the CRA. Practice Note Overview 15-16. Also see ss 1(4)-1(6) and 15 and 16 of the CRA.

<sup>147</sup> Similar to s 54(1)(a)-(c), s 58(4), and s 61(2) of the CPA all dealing with the consumer’s right to fair value, good quality, safety, and the liability of the installer.

<sup>148</sup> Section 15 of the CRA.

<sup>149</sup> Section 16 of the CRA. In particular, the statutory requirements as to quality, fitness for purpose, and description that matches the goods. Practice Note Overview 16.

<sup>150</sup> Section 16(2) read with s 19 CRA.

<sup>151</sup> Section 5(2)(a) CRA; Practice Note Overview 16.; Beale *Chitty on Contracts* vol II 38-454.

<sup>152</sup> Practice Note Overview 16.

<sup>153</sup> Practice Note Overview 16.

to the consumer, the agreement is regarded as one for digital content and not as a sale of digital content and a separate service agreement.<sup>154</sup>

Mixed contracts are relevant for fixed-term agreements under the CPA as the ordinary cell phone agreement coupled with a service agreement is an example of a mixed contract.

I turn now to the regulation of lease agreements under consumer legislation in the UK to establish differences and similarities to the regulation of lease agreements under consumer law in South Africa and Singapore.

#### 6.3.4.2.8 Hire agreements in respect of tangible movable goods

Hire and lease agreements of movable, tangible goods are contracts for the purposes of Part 1 of the CRA,<sup>155</sup> and will be covered by Parts 2 and 3 of the CRA. However, as the lease of immovable property is excluded from the operation of Part 1 on the basis of the definition of goods in section 2, these agreements are not covered by Part 1 of the CRA and will be discussed under a separate heading.<sup>156</sup>

Lease agreements of movables entered into between traders and consumers are also covered by Part 2 of the CRA,<sup>157</sup> and are therefore subject to the fairness test which promotes protection of the consumer. The fairness test applies to consumer contracts, and the court must consider fairness *mero motu*, even when it is not in dispute.<sup>158</sup> This will have the effect in practice that lessors will consider the terms and conditions in their agreements carefully, which, in turn, will result in a greater balance between the rights and obligations of the parties.<sup>159</sup>

Unlike the limitation in section 14 of the CPA, the CRA sets no maximum duration for lease agreements. This is an advantage over the CPA as the supplier and consumer can agree on a duration that suits both parties.<sup>160</sup>

#### 6.3.4.3 Part 2 of the CRA

Part 2 of the CRA contains provisions for unfair terms in agreements and in other notices – eg, information boards in car parks in which the trader notifies the public that he or she will not be liable for losses or publishes certain conditions.<sup>161</sup> Part 2 of the CRA has a wider application than Part 1 in that it covers all consumer

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<sup>154</sup> Sections 39(1)-(2) of the CRA.

<sup>155</sup> Sections 2 and 3(2) of the CRA.

<sup>156</sup> See para 6.3.7 below.

<sup>157</sup> Section 61(3) of the CRA.

<sup>158</sup> Section 71(2) of the CRA; Andrews *Enforcement* 191; Beale *Chitty on Contracts* vol II 38-361.

<sup>159</sup> See <https://www.housingrights.org.uk/news/new-consumer-rights-legislation-will-impact-tenants-landlords-and-agents> (date of use: 10 August 2019).

<sup>160</sup> See Ch 4 para 4.2.3.7.9.

<sup>161</sup> See, eg, the *ParkingEye Limited v Beavis* judgment discussed in para 6.6.4 below. Part 2 of the CRA is derived from the provisions of the Unfair Contract Terms Act 1977 and the Unfair Contract Terms in Consumer Contracts Regulations 1999; Andrews *Enforcement* 176.

contracts, although the term 'consumer contracts' is not defined in the CRA and is only used from Part 2 onwards.

#### 6.3.4.3.1 Unfairness

Section 62(4) of the CRA provides a contract term will be unfair if it is contrary to good faith,<sup>162</sup> or when it causes a significant imbalance – to the detriment of the consumer – in the respective parties' rights and obligations under the agreement.<sup>163</sup> Section 62(5) provides further guidance and determines which factors should be taken into account when establishing fairness.<sup>164</sup> Schedule 2 contains a list of terms that may be deemed unfair – the so-called 'grey list'<sup>165</sup> – while Schedule 3 contains terms that are unfair, the 'black list'.<sup>166</sup>

##### 6.3.4.3.1.1 Application of the fairness test

Part 2 of the CRA, which regulates unfair terms, applies to all consumer contracts.<sup>167</sup> The majority of the terms and conditions in contracts and notices are subject to the fairness test in both standard-form or individually-negotiated contracts. When evaluating the fairness of a term in an agreement, the type of contract and the subject matter of the contract, as well as the circumstances at the time of its conclusion must be considered.<sup>168</sup> All these aspects play a role in the interpretation of the term in question, and a term that seemed unfair at first glance could be found

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<sup>162</sup> See the discussion of good faith in para 6.3.4.3.1.2 below.

<sup>163</sup> See para 6.6 below for a discussion of judgments that dealt with this aspect. Courts must decide on the unfairness or otherwise of a term – and even though the section does not mention a significant imbalance to the detriment of the trader – one can assume that courts will also intervene where such an imbalance is detrimental for the trader.

<sup>164</sup> For a discussion of unfair terms, see MacDonald & Atkins *Law of Contract* 226-230. In South Africa, s 48(2) of the CPA sets out factors that are regarded as unfair, unreasonable, or unjust. Also see s 52(2) of the CPA for factors the court must consider in ensuring that conduct is fair and just. See discussion in Ch 4 paras 4.3.2.6 and 4.3.2.7.

<sup>165</sup> This is similar to reg 44 of the CPA Regulations.

<sup>166</sup> See Beatson et al *Anson's Law of Contract* 223-225 for a general discussion. This is similar to s 51 of the CPA.

<sup>167</sup> Part 2 of the CRA has a broader scope than Part 1. See the discussion in para 6.3.4.2. Also see Explanatory Notes 13 on the application of Part 1, and 69 on the application of Part 2. Explanatory Notes 15-16 and 74-75.

<sup>168</sup> Beatson et al *Anson's Law of Contract* 223. This is similar to the position in South Africa, however, s 52(2) of the CPA lists more factors that must be considered. Although the CRA does not expressly deal with reasonableness in Part 2 but only with fairness, s 11 of the UCTA provides that terms in consumer contracts should be reasonable and fair when taking into account all the circumstances known, or which should reasonably have been known or foreseen, by the parties at the time of conclusion of the agreement. The test is contextual. For instance, when determining whether a penalty clause in a consumer contract is reasonable, the court will consider the effect of multiple penalties charged under a single contract and assess the aggregate of the charges to establish whether the charge or charges are excessive. The provision, therefore, assists consumers involved in unfair or unreasonable contracts. See the discussion in Andrews *Enforcement* 180-181. For further information on historic considerations by courts, see Andrews *Enforcement* 181. Also see Beale *Chitty on Contracts* 2<sup>nd</sup> cumulative supplement 38-281; Radlinger paras [92]-[95].



fair when interpreted as prescribed by considering the factors in section 62(5).<sup>169</sup> Certain terms are exempt from the assessment for fairness – these are known as the ‘core exemptions’.<sup>170</sup> These are terms that reflect statutory provisions,<sup>171</sup> terms that specify what the main subject matter of the agreement is,<sup>172</sup> and terms that ‘relate to the adequacy of price against goods and services’.<sup>173</sup>

Part 2 of the CRA applies to:

- any contract between a trader and consumer where some form of consideration changes hands;
- contracts for services or digital content;<sup>174</sup>
- notices given by traders;
- terms in collateral, related, or ancillary contracts.

Section 61 of the CRA sets out the applicability and exceptions to the applicability of Part 2 of the CRA. For example, Part 2 does not apply to contracts of employment or apprenticeship, or to notices regarding the rights, obligations, or liabilities between an employer and employee.<sup>175</sup>

The CMA Unfair Terms Guidance<sup>176</sup> provides that if a contract is entered into for a minimum or defined period, the contract terms and provisions are deemed to be valid for that period. If corollary services or goods that are not directly related to the goods or services contracted for are worked into the terms of the agreement, these terms will be viewed with suspicion for possible unfairness.<sup>177</sup>

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<sup>169</sup> Beatson et al *Anson's Law of Contract* 223.

<sup>170</sup> This is dealt with in para 6.3.4.3.1.5. For further information see Practice Note Overview 86-88; MacDonald & Atkins *Law of Contract* 219-226.

<sup>171</sup> Section 73 of the CRA.

<sup>172</sup> Section 53(1)(a) of the CRA.

<sup>173</sup> Section 64(1)(b) of the CRA.

<sup>174</sup> For example, licences for intellectual property rights, personal guarantees for loans, contracts under which the consumer supplies something to the trade. See Practice Note Overview 74.

<sup>175</sup> Sections 61(2) and 61(5) CRA. This is similar to the position in South Africa under the CPA. See Ch 4 para 4.2.3.6.5.

<sup>176</sup> See

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/450440/Unfair\\_Terms\\_Main\\_Guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf) (date of use: 19 July 2019). There are also historic examples of fair and unfair terms. See Annex B. New elements of unfair terms law, unfair contract terms explained, and various other guides and information at the following website: <https://www.gov.uk/government/publications/unfair-contract-terms-cma37> (date of use: 19 July 2019).

<sup>177</sup> Practice Note 40. Also see CMA Unfair Terms Guidance 97-98; Historic Examples Annex A A53 and A92. This corresponds to s 13(1)(b) of the CPA which regulates the consumer's right to elect suppliers. Also see s 51(2)(a) of the CPA which deals with prohibited transactions, agreements, terms and conditions.

Courts must consider *mero motu* whether terms in an agreement are fair when the court has satisfactory evidence at its disposal.<sup>178</sup> The court can even consider fairness during the enforcement stage of the proceedings.<sup>179</sup> This, of course, greatly assists a party with no legal representation.<sup>180</sup> Once the court has decided on the fairness of a term or condition, it will not consider fairness during subsequent proceedings or when enforcing a court judgment.<sup>181</sup> The only exceptions to this rule are when legislation allows fairness to be reconsidered based on public policy,<sup>182</sup> and when other terms in the contract, not previously considered, should be considered for fairness.<sup>183</sup>

Section 69 of the CRA provides that when interpreting an ambiguous term in a contract (whether allegedly unfair or not), the court should interpret the term so as to benefit of the consumer.<sup>184</sup> The court has also remarked obiter that there is no real difference between the English common-law *contra proferentem* rule and the statutory obligation to interpret a term or condition for the benefit of the consumer.<sup>185</sup> In addition, the statutory interpretation in terms of section 69 should only be used as a last resort to determine the meaning of a clause or term;<sup>186</sup> in all other circumstances, courts should use the normal rules of interpretation to establish the meaning of a term or condition.<sup>187</sup>

Unfair terms or notices are significant for purposes of this thesis as these will not bind a consumer.<sup>188</sup> The remainder of the contract will, however, continue if practicable.<sup>189</sup>

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<sup>178</sup> Section 71(2) CRA. Also see Practice Note 81. When the court considers fairness of its own accord, the judge must implement the *audi alteram partem* rule. See *Banif Plus Bank Zrt v Csaba Csipai* (Case C-472/11) EU:C:2013:88 paras [17], [19]–[22] for example, where the court applied this. See *Pannon GSM Zrt v Erzsébet Sustikné Gyórfi* (Case C-243/08) EU:C:2009:350 paras [22]–[28], [31]–[35] (hereafter *Pannon*).

<sup>179</sup> This is in line with EU position. See *Pannon* and *Banco Español de Crédito SA v Joaquín Calderón Camino* (Case C-618/10) EU:C:2012:349 para [57].

<sup>180</sup> This improves access to justice, and a similar provision in the CPA would improve access to justice as envisaged in s 33 and 34 of the Constitution. See Ch 4 para 4.3.2.8.

<sup>181</sup> Practice Note Overview 81.

<sup>182</sup> *Asturcom Telecomunicaciones SL v Rodriguez Nogueira* (Case C-40/08) EU:C:2009:615 paras [55], [59].

<sup>183</sup> *Banco Primus SA v Gutierrez Garcia* (Case C-421/14) EU:C:2017:60 paras [52], [54].

<sup>184</sup> Section 69 of the CRA. This similar to s 4(4) of the CPA, see Ch 4 para 4.2.3.3. It is also similar to s 18 of the CPFTA, see Ch 5 para 5.3.2.9.2. An exception to this interpretation in favour of the consumer is ‘where an enforcement body applies for an injunction in relation to the use of a blacklisted or unfair term’. See Practice Note 81. Also see obiter remarks in *AJ Building and Plastering Ltd v Turner and Others* [2013] EWHC 484 (QB) (hereafter *AJ Building*) para [50].

<sup>185</sup> *AJ Building* para [53].

<sup>186</sup> *AJ Building* para [53]. Note that the court’s remarks on the interpretation of ambiguous clauses was made obiter, and that this case was decided in terms of earlier legislation (UTCCRs).

<sup>187</sup> Practice Note 82.

<sup>188</sup> Practice Note 80–81.

<sup>189</sup> Section 67 CRA. See the following EU cases in this regard for more information, *Pohotovost’ v Korčkovská* (Case C-76/10) EU:C:2010:685 [61] and *Pereničová and Another v SOS financ spol s r o* (Case C-453/10) EU:C:2012:144 paras [29]–[31].

#### 6.3.4.3.1.2 *The role of good faith*

The concept good faith is used in section 62 of the CRA. Section 62(4) expressly provides that ‘a term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer’.<sup>190</sup> Unfortunately, the CRA provides no definition to explain exactly what meaning should be attached to the term when interpreting or applying the section.<sup>191</sup> Good faith is not an official contract-law principle in UK law.<sup>192</sup> Apparently, the term was derived from an EU Directive and is gradually being accepted in English law,<sup>193</sup> although not yet formally defined.<sup>194</sup> The requirement of good faith has the effect that parties must negotiate openly and fairly, and terms and conditions in the contract must reflect this attitude<sup>195</sup> – especially as this concept was expressly and intentionally included in section 62 of the CRA.<sup>196</sup>

In the case of *Director General of Fair Trading v First National Bank*<sup>197</sup> the court held that good faith involves ‘fair and open dealing’.<sup>198</sup> In *Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa*<sup>199</sup> the European Court of Justice decided, when considering the good faith of the trader, that regard should be had to whether a

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<sup>190</sup> This is comparable to the position in South Africa as set out in s 48(2)(a). Also see Stoop *LLD* 114 n 195.

<sup>191</sup> El-Gendi (2017) *QMLJ* 95.

<sup>192</sup> Beatson et al *Anson’s Law of Contract* 22-23, 228-230; *Smith v Hughes* (1871) 6 LR (QB) 597. See also *Walford v Miles* [1992] 2 AC 128 where Ackner L said: ‘A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party.’ and Beale *Chitty on Contracts* vol II 38-243, 38-244, 38-246.

<sup>193</sup> From the UCTD recital 16 it was incorporated in reg 5(1) of the UTCCRs. See [http://www.legislation.gov.uk/ukxi/1999/2083/pdfs/ukxi\\_19992083\\_en.pdf](http://www.legislation.gov.uk/ukxi/1999/2083/pdfs/ukxi_19992083_en.pdf) (date of use: 7 September 2019); *DG of Fair Trading v First National Bank plc* [2001] UKHL 52; El-Gendi (2017) *QMLJ* 89.

<sup>194</sup> See <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31993L0013&from=EN> (date of use: 7 September 2019). Guidance regarding the consideration of good faith is provided in recital 16 of the preamble to the EU Directive where it states that the bargaining position of the parties, whether the consumer was induced to accept the term, and whether the goods were supplied because of a special order by the consumer, are factors that must be taken into account. In the case of *Marleasing SA v La Comercial* (Case C-106/89) [1992] 1 CMLR 305, the court permitted reference to the EU Directive, and by implication it is likely that reference to the preamble and the recitals will also be allowed. See Beatson et al *Anson’s Law of Contract* 228; El-Gendi (2017) *QMLJ* 88, 95. Also note that the decision to leave the EU could potentially influence the effect of this development in future.

<sup>195</sup> *Director General of Fair Trading v First National Bank* 2001 WL 1171932 (hereafter *First National Bank*) para [36]; Beatson et al *Anson’s Law of Contract* 228; El-Gendi (2017) *QMLJ* 88-89. See Practice Note 77-78 for a discussion of the CMA Unfair Terms Guidance on good faith pointers on openness and fair dealing. Also, see Stoop *LLD* 197-202 for more detail on good faith and its role in unfairness.

<sup>196</sup> See El-Gendi (2017) *QMLJ* 97 for his conclusion on this aspect.

<sup>197</sup> Also see MacDonald & Atkins *Law of Contract* 230-232.

<sup>198</sup> *First National Bank* para [36]. For further guidance on good faith see the CMA Unfair Terms Guidance regarding openness and fair dealing 23 available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/450440/Unfair\\_Terms\\_Main\\_Guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf) (date of use: 9 September 2019).

<sup>199</sup> C-415/11(March 14 2013) [2013] 3 CMLR 5 (hereafter *Aziz*).

consumer would have consented to the term in question had the contract been negotiated individually.<sup>200</sup> The court in *Aziz* set out considerations a trader should bear in mind when deciding whether a consumer would have agreed to terms or conditions in a contract.<sup>201</sup>

Whittaker contends that good faith was imported into section 62 to assist in the test for significant imbalance in the sense that a court should consider all the interests involved holistically, and not apply the test too rigidly and impersonally.<sup>202</sup>

There are, however, certain terms that are regarded as prohibited or suspect when determining fairness, which I now consider.

#### 6.3.4.3.1.3 *Black list*<sup>203</sup>

The purpose of the black list is to provide for terms and conditions that are prohibited. When a blacklisted term appears in a contract, the consequences are:<sup>204</sup>

- the term is not binding on the consumer and therefore, there is no need to apply the fairness test to consider the fairness of a blacklisted term;
- terms that have the same effect as blacklisted terms will also be blacklisted and will not be binding;
- when such a blacklisted term is used and its use is misleading, it could be an unfair commercial practice in terms of CPUT and the trader may therefore be potentially liable to criminal prosecution;<sup>205</sup> and
- the addition of words to a blacklisted term with the effect that a consumer's rights are not affected by such blacklisted term, will not negate the blacklisted term or make it acceptable.

#### 6.3.4.3.1.4 *Grey list*

The grey list contains terms and conditions that are deemed to be unfair. There is no provision in the CRA that provides for the burden of proof regarding these listed terms, other than the duty of the court to consider fairness *mero motu*.<sup>206</sup> This is in

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<sup>200</sup> *Aziz* para [69]. This decision was followed in *ParkingEye Ltd v Beavis* [2015] 3 WLR 1373 (hereafter *Beavis*). For a discussion of this case see para 6.6.4 below; Macdonald & Atkins *Law of Contract* 230; Beale *Chitty on Contracts* 2<sup>nd</sup> cumulative supplement 38-251A.

<sup>201</sup> These were whether the term was commonly used in the specific type of contract, if there was an objective reason for the term or condition, and if the term or condition resulted in the consumer being left without protection. See Practice Note Overview 78; *Beavis* para [105].

<sup>202</sup> Whittaker in Beale *Chitty on Contracts* vol II 38-245. Also see Practice Note Overview 77 where it is stated that good faith is a broad concept.

<sup>203</sup> Section 31 of the CRA.

<sup>204</sup> Practice Note Overview 83. For a discussion of the blacklisted terms see Practice Note Overview 83-85. For a discussion of s 51 of the CPA see Ch4 para 4.3.2.3.3.

<sup>205</sup> See Part 2 - Part 4A of CPUT and the Explanatory Memorandum to CPUT, both available at <http://www.legislation.gov.uk/uksi/2008/1277/contents> (date of use: 15 June 2020); Practice Note Overview 83.

<sup>206</sup> Section 71 of the CRA.

accordance with EU law.<sup>207</sup> The grey-listed terms are not unfair as such, but may be regarded as unfair.<sup>208</sup> However, a term listed in Schedule 2 to the CRA could be fair when considered in a particular contract.<sup>209</sup> Terms that have a similar effect in practice to those listed in Schedule 2 will also be regarded as suspect. The list is not exhaustive, and any term can potentially be found to be unfair if and when the test for fairness is applied.<sup>210</sup>

#### 6.3.4.3.1.5 Exemptions from the fairness test

Certain terms are exempt from the fairness test. These are terms included in mandatory legislation, terms that relate to the main or core subject matter of the contract,<sup>211</sup> and terms that make provision for the adequacy or appropriateness of the price in relation to the goods, digital content, or services that form the subject of the agreement.<sup>212</sup> This is known as the core exemption.<sup>213</sup> The purpose of this exemption is to allow and retain a certain measure of freedom of contract regarding

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<sup>207</sup> Beale *Chitty on Contracts* vol II 38-362.

<sup>208</sup> Practice Note Overview 85. In South Africa the CPA contains a similar provision in s 48, and a 'grey list' in reg 44. Regulation 44 of the regulations under the CPA contains a non-exhaustive list of contract terms presumed to be unfair and unreasonable. Regulation 44(2)(a) provides that the list is only indicative, so in certain circumstances a listed term may be fair.

<sup>209</sup> For instance, the penalty in *Beavis* was considered fair. See the discussion in para 6.6.4 below.

<sup>210</sup> Terms that have the following effects are grey listed:

- Terms that provide consumers will not be entitled to full redress in cases of breach.
- Terms that bind consumers to a contract beyond their expectation.
- Terms that entitle a trader to non-performance of his or her obligations in terms of the contract.
- Terms that preclude consumers from recovering advance payments on cancellation or termination of the agreement.
- Terms that entitle the trader forthwith and unilaterally to amend or vary the terms of an agreement. For instance to supply a different brand of phone than that agreed upon in a cell phone agreement.
- Terms that entitle the trader to amend the price or subject of the agreement after conclusion.
- Terms that provide that a consumer is subject to unreasonable financial sanctions.

Part 2 of the grey list provides for terms listed in Part 1 that are not grey listed when used in certain and specific types of contract, and are therefore regarded as exceptions to the grey list. See Practice Note Overview 85-86. This differs from the position in South Africa where the listed terms are presumed to be unfair. See Ch 4 para 4.3.2.3.4.

<sup>211</sup> Beale *Chitty on Contracts* vol II 38-363 38-367.

<sup>212</sup> Section 64 CRA; Practice Note Overview 86-88. Also see the CMA Unfair Terms Guidance for pointers on the core exemption. Note that the core exemption will not apply unless the term is transparent and prominently displayed. See Practice Note Overview 88; UCTD and s 64(5) of the CRA; Beatson et al *Anson's Law of Contract* 225. In South Africa, the position is different as price is not excluded/exempt. See s 52(2)(a) and (j) of the CPA.

<sup>213</sup> These are terms that reflect statutory provisions (s 73), terms that specify what the main subject matter of the agreement is, and terms that 'relate to the adequacy of price against goods and services'. For further information on these aspects see Practice Note Overview 86-88; MacDonald & Atkins *Law of Contract* 219-226; Beale *Chitty on Contracts* vol II 38-367.

the core matter of the contract, thereby allowing the free market to function despite the statutory restrictions in the CRA.<sup>214</sup>

The CMA Unfair Terms Guidance contains useful rules on the core exemption, these include pointers on when a term is a core term, and guidance on price setting terms.<sup>215</sup>

#### 6.3.4.3.1.6 *Transparency, prominence, and the average consumer*

Transparency plays an important role in the CRA in that a term in a written consumer contract must be transparent.<sup>216</sup> This emphasises the importance of information-based consumer protection, and means that the core exemption will only apply when a term in a consumer contract is transparent and prominent.<sup>217</sup> Transparency in the CRA means that a term or condition must be expressed in plain and understandable language.<sup>218</sup> In addition, when the term or agreement is in writing it must be legible.<sup>219</sup> To qualify as prominent for the purpose of section 64, a term in a consumer contract must be brought to the attention of the consumer.<sup>220</sup>

Transparency and prominence are relevant to section 14 of the CPA because information must be provided to consumers in a way that enables them to comprehend the scope of their rights, obligations, and duties under the consumer contract.<sup>221</sup>

The CMA Unfair Terms Guidance provides the following guidance on transparency.<sup>222</sup>

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<sup>214</sup> Paragraph 3.5 of the CMA Unfair Contract Terms Guidance 31 July 2015 available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/450440/Unfair\\_Terms\\_Main\\_Guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf) (date of use: 5 September 2019); Beatson et al *Anson's Law of Contract* 225.

<sup>215</sup> See

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/450440/Unfair\\_Terms\\_Main\\_Guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf) (date of use: 7 September 2019) 37-41.

<sup>216</sup> Beale *Chitty on Contracts* vol II 38-382-38-385.

<sup>217</sup> Section 64(2) CRA.

<sup>218</sup> UCTD; MacDonald & Atkins *Law of Contract* 238-239. Similar to s 49(3) CPA.

<sup>219</sup> Section 64(3) CRA; also see s 68 CRA; Beatson et al *Anson's Law of Contract* 231.

<sup>220</sup> Section 64(4) CRA. This is similar to s 49(1), (2) and (4) of the CPA.

<sup>221</sup> See the discussion of s 22 of the CPA, Ch 4 para 4.3.2.5.

<sup>222</sup> See

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/450440/Unfair\\_Terms\\_Main\\_Guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf) (date of use: 9 September 2019) 30-32. Also see Zokaityte 2016 *Capital Markets Law Journal* 405 where the writer discusses similar problems related to consumers' financial literacy and numeracy and contends that despite high requirements regarding disclosures and information to consumers, consumers appear to remain resistant to spending sufficient time and effort to do research into products and information concerning the products and effect on finances. This section is similar to s 22 of the CPA which deals with the consumer's right to information in plain and understandable language.

- The term should make grammatical sense to the average consumer<sup>223</sup> and enable the consumer to understand the economic consequences of the term.<sup>224</sup> For purposes of section 64(4) of the CRA, the average consumer is a consumer who is 'reasonably well-informed, observant, and circumspect'.<sup>225</sup>
- The consumer should be able to understand the legal consequences of the term when concluding the agreement so that he or she can determine his or her future rights and obligations.
- When the agreement involves technical or complex issues,<sup>226</sup> the trader should provide the consumer with sufficient information – eg, brochures or additional literature – to enable the consumer to understand the terminology used in the agreement. The trader should ensure that the consumer is able to understand the practical implications of the terms and how these relate to his or her rights and obligations.

The mere fact that a term in a consumer agreement is not transparent, when evaluated separately from the fairness test, does not necessarily make it unenforceable against a consumer.<sup>227</sup> When a term is ambiguous it should be interpreted in a way that favours the consumer.<sup>228</sup>

The CMA<sup>229</sup> is responsible for adherence to contracts or terms that are unfair, or not transparent.<sup>230</sup> This is similar to the position in Singapore where the Competition and Consumer Commission of Singapore must also apply, enforce, and administer the provisions of the CPFTA.<sup>231</sup> This emphasises the relationship and continued importance attached to the interaction between consumer protection and competition law in foreign jurisdictions.<sup>232</sup>

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<sup>223</sup> See s 64(5) for the description of average consumer for purposes of s 64(4) of the CRA. See the discussion of average consumer in para 6.3.4.2.1.

<sup>224</sup> CMA Guidance 30-32; and *Kásler and Another v OTP Jelzálogbank Zrt* (Case C-26/13) [2014] WLR (D) 180 para [73].

<sup>225</sup> Section 64(5) of the CRA.

<sup>226</sup> For instance, contracts for advanced and complex electronic goods like a computer network router.

<sup>227</sup> Practice Note Overview 76; Beale *Chitty on Contracts* vol II 38-385.

<sup>228</sup> Section 69 CRA. This is similar to the provisions in Singapore, see Ch 5 para 5.3.2.9.2, and South Africa Ch 4 para 4.2.3.3.

<sup>229</sup> Unfortunately, there is no comparable organisation in South Africa, and as a result the regulation of unfairness under the CPA is in the main reactive.

<sup>230</sup> This role was previously fulfilled by the Office of Fair Trading (OFT); the role of the CMA is to interpret the agreement in the same way as a court. But, where the court looks at a contract mostly retrospectively – the CMA must establish what the term or condition's future impact will be and act accordingly. See Beatson et al *Anson's Law of Contract* 231-232.

<sup>231</sup> See Ch 5 para 5.1.

<sup>232</sup> See Ch 2 para 2.7 and Ch 5 paras 5.1 and 5.2. Also see Gupta regarding the balance between the rights of consumers and healthy competition law principles and legislation available at [https://www-lawnet-sg.libproxy1.nus.edu.sg/lawnet/group/lawnet/pagecontent?p\\_p\\_id=legalresearchpagecontent\\_WA](https://www-lawnet-sg.libproxy1.nus.edu.sg/lawnet/group/lawnet/pagecontent?p_p_id=legalresearchpagecontent_WA)

#### 6.3.4.3.1.7 Concluding remarks: Unfairness, Part 2 of the CRA

The fairness, transparency, and prominence requirements benefit consumers in the UK, as they prevent traders from exploiting consumers, and vulnerable consumers in particular. However, a concept such as good faith could have been defined in the CRA to provide additional guidance as to its exact meaning, application, and interpretation under the CRA.

#### 6.3.4.4 Part 3 of the CRA

Part 3 of the CRA deals with general consumer-law issues,<sup>233</sup> including the enforcement of the CRA. It brings about change mainly in three areas:<sup>234</sup> it requires letting agents to publish their fees;<sup>235</sup> it provides for student complaint schemes;<sup>236</sup> and finally, it regulates secondary ticketing.<sup>237</sup>

This brings me to the role of the common law in the CRA which will be compared with section 2(10) of the CPA.

#### 6.3.5 Common-law rights

Consumers retain their common-law rights and remedies in addition to the rights and remedies in the CRA.<sup>238</sup> For example, sections 19(9)–19(11) of the CRA<sup>239</sup>

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R\_lawnet3legalresearchportlet&p\_p\_lifecycle=1&p\_p\_state=normal&p\_p\_mode=view&p\_p\_col\_id=column-2&p\_p\_col\_count=1&\_legalresearchpagecontent\_WAR\_lawnet3legalresearchportlet\_action=openContentPage&contentDocID=/Commentaries/61670-M.xml&queryStr=(Consumer%20protection%20Fair%20trading%20Act%20Singapore)%20AND%20(Gupta) (date of use: 27 May 2019). For a detailed discussion of the link between consumer law and competition law – and a proposal that there should be a unified theory on competition and consumer-protection law, see Lande & Averitt (1997) *Antitrust* LJ 713-756; Albors-Llorens (2014) *European Union Yearbook of European Law* 163-193.

<sup>233</sup> Enforcement, competition, letting agents' fees, student complaint schemes, and secondary ticketing, none of which is of paramount importance for purposes of this study.

<sup>234</sup> Other areas as well, eg, competition law s 81 and Schedule 8; the codification of enforcement powers by investigating officers s 77 and Schedule 5. These are not discussed in detail as they are not relevant to this study.

<sup>235</sup> Sections 83-88 of the CRA and Schedule 9.

<sup>236</sup> Section 89 of the CRA.

<sup>237</sup> Section 90 CRA. Secondary ticketing is the resale of tickets for an event, eg, a sporting or music event. See <https://www.theguardian.com/money/2018/may/25/secondary-ticketing-how-it-works-law-pitfalls-and-future-concert-football> (date of use: 16 January 2020).

<sup>238</sup> Herbert Smith Freehills available at <https://s3.amazonaws.com/documents.lexology.com/97201ec2-4738-4cfe-8be2-171592bd5d0c.pdf> (date of use: 21 August 2019). Note that there are certain advantages for consumers in using the common-law remedies for rejection and damages. For a discussion and the interaction of remedies see Beale *Chitty on Contracts* vol II 38-422-38-423.

<sup>239</sup> Sections 19(9) to 19(11) of the CRA provide that the CRA does not prevent a consumer from seeking other remedies in the circumstances provided in s 19(9), eg, when there is a breach of a requirement in the contract. In s 19(10) it provides what these other remedies may be, and in s 19(11) it describes the remedies, eg, for claiming damages.



preserve the consumer's common-law rights and remedies.<sup>240</sup> A term in a contract which prohibits or prevents a consumer from using his or her common-law rights and remedies, or which in any way dissuades or restricts the consumer from using these rights or remedies, will be void under sections 31(2),<sup>241</sup> 47(2),<sup>242</sup> and 57(4)<sup>243</sup> of the CRA. Sections 42,<sup>244</sup> 43,<sup>245</sup> and 44<sup>246</sup> entitle the consumer to other remedies, including, of course, common-law remedies.<sup>247</sup>

From the sections above it is clear that the consumer retains his or her common-law right or remedy to terminate the agreement.<sup>248</sup> The common law requires that all the terms and conditions in a contract must be brought to the attention of a consumer.<sup>249</sup> It is the consumer's choice, when exercising his or her rights under a guarantee or warranty, to decide whether to rely on his or her statutory or common-law rights against the trader, or his or her rights under the manufacturer's guarantee or warranty.<sup>250</sup> The CMA Unfair Contract Terms Guidance provides that terms in a contract which exclude or restrict the consumer's right to assignment<sup>251</sup> can be scrutinised for fairness.<sup>252</sup>

Section 58 deals with the powers of courts. The section indicates that courts are required to deviate from the normal requirement for specific performance – ie, that specific performance must be refused, unless damages are insufficient

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<sup>240</sup> Explanatory Notes paras 94–95, 102–103. This right is, however, subject to limitations in s 19(12) of the CRA which provides when the consumer may not end (terminate) a contract. This is, eg, where goods do not conform to the contract as provided in ss 15 and 16 of the CRA, except as provided in subss 19(3)–(6). For a discussion of this aspect see Beatson et al *Anson's Law of Contract* 539.

<sup>241</sup> Section 31 relates to liability that cannot be excluded or restricted under a contract for the supply of goods.

<sup>242</sup> Section 47 relates to liability that cannot be excluded or restricted under a contract for the supply of digital content.

<sup>243</sup> Section 57 relates to liability that cannot be excluded or restricted under a contract for the supply of services.

<sup>244</sup> Section 42 sets out the consumer's right to enforce the terms of a contract in respect of digital content.

<sup>245</sup> Section 43 sets out the consumer's right to repair or replacement of digital content.

<sup>246</sup> Section 44 sets out the consumer's right to a reduction in price in respect of digital content.

<sup>247</sup> See Explanatory Notes paras 207–208; Beatson et al *Anson's Law of Contract* 539–540.

<sup>248</sup> Section 54(7)(f); Beatson et al *Anson's Law of Contract* 540 n 46.

<sup>249</sup> Practice Note Overview 20.

<sup>250</sup> Only goods are at stake in this instance as the definitions of consumer guarantee in s 30 of the CRA, and of commercial guarantee in the CCR, reg 5 cover only goods. Practice Note Overview 31–32. Other references to the consumer's common-law rights include, eg, s 53. See Explanatory Notes para 260 and for more examples paras 262–265, 271–272, 373.

<sup>251</sup> A common-law contractual right. Assignment is a transfer of rights in property to another which entitles the transferee to the rights the transferor had prior to the transfer. See <https://legal-dictionary.thefreedictionary.com/assignment> (date of use: 21 January 2020).

<sup>252</sup> See 5.33 Unfair Terms Main Guidance available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/450440/Unfair\\_Terms\\_Main\\_Guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf) (date of use: 9 September 2019).

‘punishment’<sup>253</sup> – and to this extent section 58 can be seen to affect consumers’ common-law rights.

A trader retains his or her common-law rights by implication, for example in Schedule 2 to the CRA where the trader retains his common-law right to terminate a contract, but the trader may not reserve the right to terminate a contract in circumstances not permitted at common law as this could be regarded as unfair.<sup>254</sup> A trader would probably be entitled to protection under the common-law ‘unilateral mistake’ doctrine where he or she inadvertently makes a pricing mistake.<sup>255</sup>

There is no express and general provision in the CRA which retains parties’ common-law rights, and one assumes the applicability of the common law will have to be established separately on a case-by-case basis. By implication, however, when not expressly excluded, it is assumed that parties retain their common-law rights and remedies<sup>256</sup>

In South Africa, the common law has been expressly retained in section 2(10) of the CPA.<sup>257</sup>

Because it is essential to establish the role, importance, and admissibility of external evidence regarding contract terms and circumstances surrounding the conclusion of agreements, the application of the parol evidence rule in UK consumer law must also be considered.

#### 6.3.6 Parol evidence

In general, the parol evidence rule<sup>258</sup> applies in the UK.<sup>259</sup> There are exceptions to its application, principally when it is clear that the parties did not intend the written contract to record their entire agreement.<sup>260</sup> Therefore, the ambit of the rule is limited until it is proven that the written contract was intended to form the only and whole

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<sup>253</sup> See Beatson et al *Anson’s Law of Contract* 610-611 for more information and a discussion.

<sup>254</sup> Practice Note Overview 46; paras 7 and 8 Schedule 2 to the CRA.

<sup>255</sup> Practice Note Overview 36-37.

<sup>256</sup> See in this regard Whittaker *LQR* 71 where he concludes that English consumer law ‘...remains a patchwork, with the general law set by the common law...’.

<sup>257</sup> See the discussion in Ch 4 para 4.2.4.

<sup>258</sup> For a general discussion of parol evidence see Ch 3 para 3.2.9.

<sup>259</sup> *Jacobs v Batavia and General Plantations Trust* [1924] 2 Ch 329; *Adams v British Airways plc* [1995] IRLR 574 [21]; Beatson et al *Anson’s Law of Contract* 146-148; Beale *Chitty on Contracts* vol I 13-99-13-102.

<sup>260</sup> *Gillespie Bros & Co v Cheney, Eggar & Co* [1896] 2 QB 59, 62.

agreement between the parties.<sup>261</sup> The UK Law Commission stated this point of view in its 1986 Report on the rule.<sup>262</sup> This has also been confirmed by courts.<sup>263</sup>

The only exception to this rule is that parol evidence is allowed where documents must be linked to each other, or where there is an implied or express reference to another document or documents in the contract.<sup>264</sup> The inclusion of an 'entire agreement' clause<sup>265</sup> will not necessarily exclude parol evidence.<sup>266</sup>

There is no express reference in the CRA to the parol evidence rule or its application, or even its exclusion in contracts. However, when sections 11 and 12 in respect of goods, section 36 in respect of digital content, and sections 37 and 50 in respect of service contracts, are analysed, it is clear that these sections provide that contracts include the pre-contractual information<sup>267</sup> the trader provided to the consumer as a term or terms in the contract.<sup>268</sup> Therefore, the parol evidence rule does not apply in these circumstances.

This is welcomed, as the consumer will generally benefit from a provision allowing pre-contractual information. It is an improvement on the position in the CPA especially as contracts are not individually negotiated where standard-form contracts are used and, in addition, the consumer is often in an inferior bargaining position as he or she cannot negotiate individual contract terms with the supplier.

The next important aspect of the CRA is to establish whether lease agreements of immovable property are regulated by the CRA.

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<sup>261</sup> Beale *Chitty on Contracts* vol I 13-103; Beatson et al *Anson's Law of Contract* 147.

<sup>262</sup> Beale *Chitty on Contracts* vol I 13-102; Beatson et al *Anson's Law of Contract* 147-148; The Law Commission Report 1986 Parol Evidence 27.

<sup>263</sup> See *Yani Haryanto v ED & F Man (Sugar) Ltd* [1986] 2 Lloyd's Rep 44; *Rosseel NV v Oriental Commercial Shipping Co (UK) Ltd* [1991] 2 Lloyd's Rep 625, 628.

<sup>264</sup> Beale *Chitty on Contracts* vol I 13-105 – 13-106.

<sup>265</sup> These clauses are normally found in standard-term contracts, eg, standard consumer agreements. The purpose of these clauses is to exclude all statements or representations not included in the written agreement.

<sup>266</sup> Beale *Chitty on Contracts* vol I 13-107. The most likely reason is that the whole purpose of such a clause is to exclude statements or representations other than those in the written agreement, which could of course seriously disadvantage the other party. For a general discussion of the parol evidence rule and its application in the UK, see Beale *Chitty on Contracts* vol I 13-108-13-136.

<sup>267</sup> Consumer Contracts Regulations 2013 (SI 2013 No 3134) this includes most written and oral representations, notices, and advertisements; Beatson et al *Anson's Law of Contract* 144-145.

<sup>268</sup> For instance, on a notice board, in advertisements, or notices. Also, see Beatson et al *Anson's Law of Contract* 144-145.

### 6.3.7 *Lease agreements of immovable property*<sup>269</sup>

In the UK lease agreements in respect of immovable property entered into between traders and consumers are covered only by Parts 2 and 3 of the CRA,<sup>270</sup> and are therefore subject to the fairness test.<sup>271</sup> This, of course, leads to better protection for consumers. The definition of goods in section 2 of the CRA excludes immovable property as goods are limited, *inter alia*, to ‘tangible movable items’, and lease agreements in respect of immovable property are therefore excluded from the operation of Part 1 of the CRA.<sup>272</sup>

Lease agreements are consumer contracts<sup>273</sup> in terms of section 61 of the CRA, which means that notices in terms of leases must comply with requirements set for consumer contracts and notices, and are subject to the normal review applicable to consumer notices.<sup>274</sup>

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<sup>269</sup> Lease agreements of movables will fall under Part 1 of the CRA, and depending on whether they relate to goods, or are mixed contracts the relevant chapters of Part 1 will apply.

<sup>270</sup> See s 61 in Part 2 of the CRA and s 83 of Part 3 of the CRA, as well as Schedule 9. Lease agreements were previously regulated by the Unfair Terms in Consumer Contracts Regulations 1999. These provisions are now included, virtually verbatim, in the CRA. See Curbison & Webb <https://www.lawgazette.co.uk/legal-updates/when-property-law-and-consumer-legislation-collide/5068335.article> (date of use: 10 August 2019). Although these regulations are virtually identical to the provisions in the CRA the Guidance on unfair terms in tenancy contracts has been withdrawn by the Office of Fair Trading. See [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/616956/oft356.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/616956/oft356.pdf) (date of use: 10 August 2019). Also note that letting agents are now required to publish their fees in terms of s 83 of the CRA.

<sup>271</sup> See the definition of goods in s 2 of the CRA and the discussion in para 6.3.4.2.3. As an aside, as it is technical and involves the interaction between the Leasehold Reform Housing and Urban Development Act 1993 and the UCTA now replaced by the CRA, this aspect is not directly relevant to this study. It, however, remains interesting to see what is regarded as unfair, see the recent judgment in *Jones v Roundlistic Limited* [2018] EWCA Civ 2284 paras [33]-[37], [40], [47]-[48] (the parties have indicated that they will ask for leave to appeal this decision), and the discussion of this judgment at <https://www.lawgazette.co.uk/legal-updates/when-property-law-and-consumer-legislation-collide/5068335.article> (date of use: 10 August 2019); Grant & Grace <https://www.outertemple.com/2018/10/court-of-appeal-gives-guidance-on-unfair-terms-consumer-credit-regulations-1999/> (date of use: 10 August 2019); and <https://www.alep.org.uk/article/795/when-property-law-and-consumer-legislation-collide-jones-v-roundlistic-limited-2018-ewca-civ-2284> (date of use: 10 August 2019).

<sup>272</sup> See the definition of goods discussed in para 6.3.4.2.3.

<sup>273</sup> The CRA uses the term ‘consumer contract’ in the text of the CRA for the first time in s 61, apart from the reference to the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 in s 50 and, of course, on the cover page of the CRA, and the headnote reference to ‘consumer contracts’ on each page of the CRA. This term is used consistently in ss 61-76 of Part 2 of the CRA. Reference to the term is also found in the Schedules for instance in Schedule 1 item 35.

<sup>274</sup> In addition, the CRA requires letting agents to disclose their fees. See <https://www.housingrights.org.uk/news/new-consumer-rights-legislation-will-impact-tenants-landlords-and-agents> (date of use: 10 August 2019). The provisions in Part 2 of the CRA could have a significant impact on the property sector in the UK, see Stevens-Hoare <https://www.lexisnexis.co.uk/blog/built-environment/could-the-consumer-rights-act-2015-affect-the-property-sector> (date of use: 10 August 2019).

The fairness test applies to standard contract terms and the court must consider fairness *mero motu*, even when fairness is not in dispute.<sup>275</sup> This will have the effect in practice that lessors will consider the terms and conditions in their agreements carefully, and this in turn results in a better balance between the rights and obligations of the parties.<sup>276</sup>

Where furniture and household equipment are included in a lease agreement for immovable property – eg, the lease of a furnished apartment – the agreement could in addition, qualify as a contract for the hire of goods, and in that respect falls under Part 1 of the CRA.<sup>277</sup> When services such as cleaning are included in the lease agreement the provisions of Part 1 of the CRA relating to services will also apply.<sup>278</sup> In the event that internet services and provision form part of the lease agreement, the provisions relevant to digital content in Part 1 of the CRA will apply to that specific part of the lease agreement.<sup>279</sup>

There is no maximum duration set by the CRA for lease agreements, which distinguishes the CRA from the limitation in section 14 of South African CPA. This is an advantage over the CPA as the supplier and consumer can agree on a duration that suits both parties.<sup>280</sup> The terms and conditions of leases in the UK are subject to the fairness test in the CRA. Further protection for lessees is that letting agents are now required to publicise their fees.<sup>281</sup> This disclosure is another instance of a tool in the CRA to effect information-based consumer protection.

The advantages of the regulation of leases of immovable property in the UK are:

- There is no statutorily prescribed maximum duration for these contracts. This enables parties to agree on a mutually beneficial duration.
- The contracts are subject to the fairness test.
- Letting agents must publicise their fees which results in better informed consumers and contributes to improved consumer protection.

These advantages could benefit both consumers and suppliers in lease agreements in terms of section 14 of the CPA.<sup>282</sup>

Under the following heading I analyse the CRA to establish whether there are guidelines to establish fairness of the duration of fixed-term contracts under the CRA.

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<sup>275</sup> Section 71(2) of the CRA; Andrews *Enforcement* 191; Beale *Chitty on Contracts* vol II 38-361.

<sup>276</sup> See <https://www.housingrights.org.uk/news/new-consumer-rights-legislation-will-impact-tenants-landlords-and-agents> (date of use: 10 August 2019).

<sup>277</sup> Sections 9-14 of the CRA.

<sup>278</sup> Sections 50-57 of the CRA.

<sup>279</sup> Section 1(1). Practice Note Overview 15.

<sup>280</sup> See the discussion of this aspect in Ch 4 paras 4.2.3.7.9 and 4.2.3.8.

<sup>281</sup> See ss 83-88 of the CRA in Ch 3 of Part 3 of the CRA, and see Schedule 9.

<sup>282</sup> See Ch 4 para 4.2.3.8.

### 6.3.8 *The duration of contracts*

As indicated above, under the CRA the parties are free to determine the duration of their contracts.<sup>283</sup> For example, cell phone contracts generally run for between 12 and 36 months.<sup>284</sup> When the duration of an agreement is inordinately long, this could be viewed as unfair – particularly as regards so-called ‘tie-in’ periods.<sup>285</sup>

The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134), however, require traders to provide details on the duration of a contract, whether it can be extended automatically, or if its term is indefinite.<sup>286</sup> The trader must also provide information regarding the termination of the agreement, including conditions and charges that may be applicable on termination, the notice period required, and how such notice should be given to the other party.<sup>287</sup>

When a consumer enters into an online transaction, information regarding the duration of the agreement must be provided to the consumer before he or she agrees to purchase the goods or services. In practice, this means the information must be provided clearly on the trader’s order page where it will stand out more clearly, rather than in the link to or in the terms and conditions page or information linked to the transaction.<sup>288</sup> Adhering to this practice will assist the trader in proving the information was provided clearly to the consumer before the order was placed should a consumer subsequently allege unfairness or non-disclosure.

There are a few instances when the duration of a contract will be regarded with suspicion, and these instances and how UK consumer law deals with these are now considered.

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<sup>283</sup> The Timeshare Regulations discussed in para 6.4 below do, however, limit the minimum duration of time-share contracts to the extent that a consumer can only give notice to cancel the agreement after the second instalment.

<sup>284</sup> See <https://www.o2.co.uk/shop/phones#sort=content.sorting.featured&page=1> (date of use: 3 July 2019); <https://www.mobiles.co.uk/samsung-galaxy-s10-512gb-prism-black?tariffcode=HGCFMFEB19&giftcode=NA16> (date of use: 3 July 2019); <https://www.androidauthority.com/best-uk-mobile-network-835186/> (date of use: 3 July 2019).

<sup>285</sup> See para 6.3.8.4 below for a discussion of tie-in periods.

<sup>286</sup> The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) Schedule 1 (i) 22.

<sup>287</sup> Practice Note Overview 23-24.

<sup>288</sup> See reg 14(2) CCRs available at [http://www.legislation.gov.uk/uksi/2013/3134/pdfs/ukxi\\_20133134\\_en.pdf](http://www.legislation.gov.uk/uksi/2013/3134/pdfs/ukxi_20133134_en.pdf) (date of use: 8 September 2019). See Guidance on the CRD for more information on this available at [https://ec.europa.eu/info/sites/info/files/crd\\_guidance\\_en\\_0\\_updated\\_0.pdf](https://ec.europa.eu/info/sites/info/files/crd_guidance_en_0_updated_0.pdf) (date of use: 8 September 2019) 28.

#### 6.3.8.1 *Automatic renewals*

The CMA Unfair Contract Terms Guidance provides guidelines on the automatic renewal of contracts.<sup>289</sup> The Guidance provides that the automatic renewal of contracts has the same effect on consumers as an involuntary extension of the obligation to make payments in terms of the agreement.<sup>290</sup> Automatic renewal terms may be deemed unfair if the terms aim to automatically extend a contract of fixed duration beyond such fixed duration; when the consumer has not indicated otherwise; or where the date by which the consumer must opt for the extension is unreasonably early in the contract term.<sup>291</sup>

Transparency in the terms and negotiations is important, and if the auto-renewal of an agreement is made clear before the purchase, the auto-renewal will in all likelihood be deemed fair.<sup>292</sup> A trader must also send the consumer a reminder of a reasonable period before the renewal takes place, which should clearly explain to the consumer what the terms of the renewal are, and what steps the consumer should take to prevent auto-renewal.<sup>293</sup>

The consumer can cancel the agreement during the renewal period without incurring any charge or penalty,<sup>294</sup> subject to the condition that the procedures for such a cancellation do not unfairly bind the consumer to the agreement.<sup>295</sup> The consumer's right to cancel post-renewal of the agreement is not restricted to agreements where the consumer has such right in terms of the CCRs.<sup>296</sup>

#### 6.3.8.2 *Indefinite contracts*

There are specific provisions in the UK relating to contracts that continue indefinitely thereby obliging the trader to give reasonable notice to the consumer of the

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<sup>289</sup> See CMA Unfair Terms Guidance 95-96, available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/450440/Unfair\\_Terms\\_Main\\_Guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf) (date of use: 28 March 2020).

<sup>290</sup> See historic Annex A group 8 A51 available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/450467/Unfair\\_terms\\_guidance\\_Annex\\_A.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450467/Unfair_terms_guidance_Annex_A.pdf) (date of use: 3 July 2019).

<sup>291</sup> Historic Annex A A51. Further, see A51-A52 for examples of terms and the proposed term to be used instead of such unreasonable term.

<sup>292</sup> Practice Note Overview 23.

<sup>293</sup> CMA Unfair Terms Guidance 95-96; Practice Note Overview 23.

<sup>294</sup> Par 9 Part 1 Schedule 2 to the CRA – in contrast with s 14 of the CPA.

<sup>295</sup> CMA Unfair Terms Guidance 95-96; Practice Note Overview 23-24.

<sup>296</sup> See in this regard <https://www.gov.uk/government/publications/letter-from-the-cma-to-cloud-storage-providers-on-consumer-law/checklist-for-cloud-storage-providers-terms-to-look-out-for> (date of use: 3 July 2019); [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/510338/UCT\\_09\\_Subscriptions.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/510338/UCT_09_Subscriptions.pdf) (date of use: 3 July 2019).

termination of such agreement where there are valid grounds for the termination.<sup>297</sup> The consumer must be accorded a reciprocal right.<sup>298</sup>

A contract can only be terminated with immediate effect if there are valid reasons for doing so and if those reasons are set out in the contract.<sup>299</sup>

#### 6.3.8.3 *The right to terminate*<sup>300</sup>

A contract can also contain provisions allowing the trader to terminate the agreement, as contractual termination may, in certain instances, be easier for the trader to enforce than a termination in terms of the common law.<sup>301</sup> These circumstances are, for example, in contracts for the long-term delivery of services, supply, or delivery of goods. After the initial period the consumer's right to cancel terminates, and the trader may wish to reserve the contractual right to terminate the agreement as a result of non-payment by the consumer. Another example is when the trader wants to discontinue a product or service and the contract is of indeterminate duration subject, of course, to providing the consumer with a reciprocal right to terminate the agreement.<sup>302</sup> An immediate termination will only be possible in exceptional circumstances.<sup>303</sup>

#### 6.3.8.4 *Tie-in periods*

Tie-in periods are fixed periods, normally with a minimum duration, during which the consumer is obliged to continue paying for the trader's goods or services, sometimes even if he or she has given notice of termination of the agreement.<sup>304</sup> The CMA provides guidance on unfair contract terms.<sup>305</sup> The CMA guidance is not

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<sup>297</sup> Schedule 2 to the CRA para 8, eg, contracts for the delivery of milk or a newspaper.

<sup>298</sup> Practice Note Overview 46.

<sup>299</sup> CMA Unfair Terms Guidance 94-95.

<sup>300</sup> See Beatson et al *Anson's Law of Contract* 552 for a general discussion of termination clauses and the interaction between the common-law right to terminate and a contractual term to terminate.

<sup>301</sup> Practice Note Overview 46.

<sup>302</sup> Practice Note Overview 46.

<sup>303</sup> Unfair Terms Guidance para 5.18.

<sup>304</sup> See the Unfair Terms Main Guidance 86 n 97, paras 5.15.4, 5.15.7, 91 n 102; and *Ashbourne* para [169]. Unfortunately, neither the CRA nor the Explanatory Notes, provides us with a definition of a tie-in period. See Practice Note Overview 45. The term is normally used in the UK in estate agent agreements which mandates estate agents to sell an immovable property. In England the minimum period for such a tie seems to be six weeks. See <https://www.which.co.uk/money/mortgages-and-property/home-movers/selling-a-house/estate-agent-fees-and-contracts-an2n90t09n2g> (date of use: 3 July 2019). In South Africa these agreements are normally referred to as sole-agent agreements and the essence of the agreement is that the seller is obliged to pay the estate agent commission during the period of the 'tie' – even if the sale was effected by another estate agent or by the seller himself. The essence and importance of the tie-in period appears to be that there is an obvious imbalance of rights loaded against the consumer during the tie-in period, and the consumer must pay for goods or services whether or not he or she uses them.

<sup>305</sup> See CMA Guidance 95-96 available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/)



law, but reflects the CMA's views on the intention of the legislature. Courts have the final say on the interpretation, operation, and application of the CRA.<sup>306</sup>

Tie-in periods are viewed with suspicion when they prohibit termination during the tie-in period, especially when the consumer remains liable for all, or largely all payments during the tie-in period.<sup>307</sup> When the clause provides that a charge or penalty must be paid to terminate the agreement, and that amount is equal to, or amounts in practice, to all of the payments for the tie-in period, or when the tie-in period is very long, the clause will also be viewed with suspicion.<sup>308</sup> Tie-in clauses that do not evenly balance the rights and contractual relationship between the parties could be regarded as unfair.<sup>309</sup>

#### 6.3.8.5 Concluding remarks: Duration of fixed-term contracts in the UK

The above classification, principles, and provisions dealing with terms and conditions relating to the duration of contracts, and the way they are dealt with in UK consumer law, are instructive for the purpose of this study – in particular the fact that there is no maximum duration for consumer contracts in the UK. The shortcomings and limitations of fixed-term contracts under section 14 of the CPA<sup>310</sup> would greatly benefit from similar flexible provisions.

#### 6.3.9 Concluding remarks: The CRA

From the analysis in this chapter, it is clear that UK consumer law is not consolidated as a whole in the CRA as recommended.<sup>311</sup> Applicable regulations, the EU Directives, as well as EU case law must be consulted in addition to the CRA. This makes it difficult to establish the correct and complete legal position on any given set of facts at a single glance. As such, the CRA must be regarded as an opportunity lost effectively to simplify the UK's statutory consumer law.

Despite these criticisms, the CRA and UK consumer-law regime are an improvement on the previous position in the UK and provide better protection for

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450440/Unfair\_Terms\_Main\_Guidance.pdf (date of use: 8 September 2019). Also see Historic Annex A Group 8 A51-A52 available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/450467/Unfair\\_terms\\_guidance\\_Annex\\_A.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450467/Unfair_terms_guidance_Annex_A.pdf) (date of use: 8 September 2019).

<sup>306</sup> CMA Guidance 7.

<sup>307</sup> Practice Note Overview 45.

<sup>308</sup> CMA Unfair Terms Guidance 95-96 available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/450440/Unfair\\_Terms\\_Main\\_Guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf) (date of use: 28 March 2020) and see *Ashbourne* in para 6.6.1 below.

<sup>309</sup> Practice Note Overview 45. See the discussion of *Ashbourne* in para 6.6.1 below for suggestions by the court as to what a trader should do to prevent the tie-in period from being found unfair.

<sup>310</sup> See Ch 4 paras 4.2.3.7.7 and 4.2.3.8.

<sup>311</sup> Beale *Chitty on Contracts* vol II 38-195-38-196; Devenney (2018) *JBL* 510-511 identifies the main shortcomings in the reform process.

consumers in fixed-term agreements than section 14 of the CPA, for example, by not limiting the duration of contracts and by granting the consumer the right to terminate the agreement upon non-delivery by the trader.<sup>312</sup>

Having discussed the overall system, I turn now to its application through an examination of the UK's approach to time-share.

### 6.4 Timeshare agreements

The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010<sup>313</sup> introduced the EU Timeshare Directive 2009<sup>314</sup> to the UK. In essence, the Timeshare Regulations protect consumers by providing pre-contractual duties the trader must perform<sup>315</sup> and allowing the consumer fourteen days within which to withdraw from the agreement.<sup>316</sup>

The Timeshare Regulations prescribe formalities for time-share agreements. For instance, the contract must be in writing and contain certain prescribed information.<sup>317</sup>

A time-share contract is defined in regulation 7 as:

'7 (1)A "timeshare contract" means a contract between a trader and a consumer<sup>318</sup>—

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<sup>312</sup> Section 28(6) of the CRA para 6.3.4.2.4 above.

<sup>313</sup> SI 2010/2960, hereafter the Timeshare Regulations. The Timeshare Regulations regulate 'timeshare contracts' and 'long-term holiday product contracts'. Exchange agreements and resale agreements of these agreements are also covered by the regulations. For ease of reference, the agreements will be collectively referred to as time-share contracts or agreements in this study.

<sup>314</sup> See Directive 2008/122/EC <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0122&from=EN> (date of use: 15 January 2020).

<sup>315</sup> The trader must provide information that is clear, correct, and easy to understand on a prescribed form. In addition, and based on the information provided, the consumer must be able to make an informed decision whether to enter into the agreement or not, and the language used for the agreement must be one of the official languages of the state in which the consumer has citizenship or resides. Regulations 12 and 13. Beale *Chitty on Contracts* vol II 38-138.

<sup>316</sup> Regulations 20 and 21 of the Timeshare Regulations. Beale *Chitty on Contracts* vol II 38-136. Also note the 14-day period is extended in certain circumstances, see regs 12-18, and 20-24 of the Timeshare Regulations.

<sup>317</sup> See Parts 1 and 3 of Schedules 1, 2, 3 and 4 to the Timeshare Regulations for information on all the requirements.

<sup>318</sup> Regulation 11(1) of the Timeshare Regulations provides the definitions of consumer and trader:  
'11.— (1) In these Regulations – "consumer" means an individual who is not acting for the purposes of a trade, business, craft or profession; "trader" means –  
(a) a person acting for purposes relating to that person's trade, business, craft or profession, or  
(b) anyone acting in the name of, or on behalf of, a person falling within paragraph (a).  
(2) Any reference in these Regulations to a consumer or trader in relation to a regulated contract, means –

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- (a) under which the consumer, for consideration, acquires the right to use overnight accommodation for more than one period of occupation, and
  - (b) which has a duration of more than one year, or contains provision allowing for the contract to be renewed or extended so that it has a duration of more than one year.
- (2) The reference to “accommodation” in paragraph (1) includes a reference to accommodation within a pool of accommodation.’

The Regulations also deal with long-term holiday product contracts which are defined in regulation 8 as:

- ‘8. A “long-term holiday product contract” means a contract between a trader and a consumer—
- (a) the main effect of which is that the consumer, for consideration, acquires the right to obtain discounts or other benefits in respect of accommodation, and
  - (b) which has a duration of more than one year, or contains provision allowing for the contract to be renewed or extended so that it has a duration of more than one year, irrespective of whether the contract makes provision for the consumer to acquire other services.’

These definitions correspond to the general concept of time-share internationally.

A consumer can withdraw from the time-share agreement within fourteen days of conclusion of the agreement without providing reasons for the withdrawal.<sup>319</sup> This withdrawal terminates the time-share and all ancillary agreements.<sup>320</sup>

The time-share contract and long-term holiday product contract are both interesting from a South African perspective in that both have a minimum duration, in contrast to the position in South Africa. Regulation 24 provides that a consumer can terminate a time-share contract without penalty<sup>321</sup> by giving notice to the trader no later than fourteen days after the request for an instalment<sup>322</sup> is due.<sup>323</sup> In other

- 
- (a) in the case of a contract which has been entered into, the consumer or trader who is party to the contract, or
  - (b) in the case of a proposed contract, the consumer and trader who will be parties to the contract, once it is entered into.’

These are in essence the same as those dealt with in the CRA. For purposes of this study this aspect will not be discussed in detail.

<sup>319</sup> Regulations 20 and 21 of the Timeshare Regulations.

<sup>320</sup> Regulation 22(2)(b) Timeshare Regulations, for example, exchanges. See Beale *Chitty on Contracts* vol II 38-140.

<sup>321</sup> Regulation 24(1).

<sup>322</sup> Not including the first instalment, reg 24(4).

<sup>323</sup> Regulation 24(2-4).

words, after the first year of the agreement. This restriction is for the benefit of the consumer who may terminate any long-term holiday product that is a 'regulated contract',<sup>324</sup> provided it is the second or later instalments as set out in the instalments schedule.<sup>325</sup> The Timeshare Regulations expressly provide that all payments must be of equal value, and the situation therefore differs from many agreements in South Africa where a deposit is usually payable under time-share agreements, depending on the type of agreement entered into.<sup>326</sup>

The Timeshare Regulations have the following protective mechanisms for consumers.

- The requirement to provide prescribed information in regulation 12 of the Timeshare Regulations.<sup>327</sup>

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<sup>324</sup> A regulated contract is a time-share contract to which the Timeshare Regulations apply and is not excluded within the meaning of reg 6. These are, eg, multiple reservations, normal lease agreements, hotel loyalty schemes, and certain insurance agreements as specified in reg 6(5). Therefore, all agreements normally viewed as time-share should be covered by the term 'regulated contract'. For more information and a discussion, see Beale *Chitty on Contracts* vol II 38-137 and vol II 990 n 825.

<sup>325</sup> Regulation 24 – also see reg 26 for the schedule that sets out the payment schedule. Beale *Chitty on Contracts* vol II 38-140.

<sup>326</sup> Depending on whether it is point-based, shares are bought with payment of an annual levy, or it could even be a share-block transaction.

<sup>327</sup> 12.– (1) 'Before entering into a regulated contract, the trader must –

- (a) give the consumer the key information in relation to the contract, and
- (b) ensure that the information meets the requirements of this regulation.

(2) The trader must comply with paragraph(1) in good time before entering into the contract.

(3) The "key information" in relation to a contract means –

- (a) the information required by Part 1 of the standard information form (see regulation 13(2)),
- (b) the information set out in Part 2 of that form, and
- (c) any additional information required by Part 3 of that form.

(4) The information must be –

- (a) clear, comprehensible and accurate, and
- (b) sufficient to enable the consumer to make an informed decision about whether or not to enter into the contract.

(5) The information must be provided –

- (a) in the standard information form, completed in accordance with regulation 13(1),
- (b) in writing,
- (c) free of charge, and
- (d) in a manner which is easily accessible to the consumer.

(6) If the consumer is resident in, or a national of, an EEA State, the information must be provided in a language which is an official language of an EEA State and which is –

- (a) the language, or one of the languages, of the EEA State in which the consumer is resident, or
- (b) the language, or one of the languages, of the EEA State of which the consumer is a national.

- A cooling-off period.
- The right to withdraw from the agreement from the second instalment (year) onwards.

Failure to comply with the Timeshare Regulations is a criminal offence and is punishable by a fine.<sup>328</sup>

South African consumers trapped in long-term time-share agreements could benefit from such a provision.<sup>329</sup> The only significant difference is that in South Africa in many instances, there is a deposit or purchase price payable, and if it is a sizable amount, cancellation could be to the detriment of the consumer as he or she could risk losing all or most of this payment. However, to be fair, the trader cannot be expected immediately to repay this amount as it could cause cash flow and liquidity problems for developers of time-share schemes. The long-term solution is to amend South African time-share legislation to provide for equal payments and a cancellation right. In addition to the rest of the well-regulated aspects of time-share contracts in the UK, this is a huge advantage.

The procedures consumers must follow to enforce their rights, and the remedies at their disposal in terms of the CRA are now highlighted.

#### 6.5 *Procedures and remedies for consumers when dissatisfied*

When a consumer is dissatisfied with the goods, services, or digital content he has bought, the CRA offers various remedies.<sup>330</sup> These statutory remedies are in addition to his or her common-law remedies, and he or she may elect whether to use the statutory or common-law remedies.<sup>331</sup> The remedies differ depending on whether the consumer bought goods, services, or digital content, and are dealt with briefly below.<sup>332</sup>

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- (7) If there are two or more languages in which the information could be provided under paragraph (6), the trader must give the consumer the opportunity to nominate one of them and –
- (a) where the consumer does make a nomination, the information must be provided in the nominated language;
  - (b) where the consumer does not make any nomination, the information may be provided in any one of those languages.
- (8) A trader who contravenes paragraph (5) of this regulation commits an offence.'

<sup>328</sup> For further information see regs 12(5), 12(8) and 27-34 of the Timeshare Regulations.

<sup>329</sup> See the discussion in Ch 4 para 4.2.3.9.

<sup>330</sup> Also see Devenney (2018) *JBL* 506-507.

<sup>331</sup> For a detailed discussion of the enforcement of private rights see Andrews *Enforcement* 262-274.

<sup>332</sup> See Devenney (2018) *JBL* 498-505.

### 6.5.1 Goods

Consumers can reject faulty goods within 30 days of concluding the contract.<sup>333</sup> There are no formal requirements in the CRA for such notice provided that the consumer indicates to the trader, either verbally or by his or her actions that he or she intends to end the contract. Such notice should, however, be clear and should be understood by the trader.

The Act provides for a two-staged remedy.<sup>334</sup>

- The consumer's first line of remedy is his or her right to have the goods repaired or replaced within a reasonable time. The trader has one opportunity to repair or replace the goods after which the consumer can move to the next stage/tier of remedies.
- The consumer's second-stage remedy is to have the price reduced.
- Finally, if all else fails, the consumer can reject the goods and cancel the agreement.<sup>335</sup> Where the consumer rejects the goods after expiry of more than six months since taking possession of the goods, the trader is entitled to claim deductions to the purchase price as compensation for use by the consumer. The consumer must return the goods to the trader upon rejection of the agreement and is entitled to a refund of the purchase price, depending on the nature of the contract and the goods.

### 6.5.2 Digital content

Digital content cannot be rejected, as the CRA does not provide the consumer with the right to reject digital content.<sup>336</sup> Consumers have the right to repair, replacement, or in applicable circumstances, a price reduction in respect of digital content.<sup>337</sup>

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<sup>333</sup> Section 20 read in conjunction with s 22 of the CRA. This period could be shorter due to the specific nature of the goods in question. If the goods are replaced or repaired by the trader within the prescribed period, the consumer's right to reject will be extended by seven days.

<sup>334</sup> This is similar to s 56(2) read with s 20 of the CPA.

<sup>335</sup> Section 20(5) of the CRA. Digital content cannot be rejected, consumers have the right to repair, replacement, or in applicable circumstances, a price reduction. Sections 42-46 of the CRA.

<sup>336</sup> See ss 42-46 of the CRA which sets out the rights of the consumer to enforce terms in respect of digital content. There is no equivalent provision in the CPA in South Africa. The only comparable provision in the CPA is s 20(3) which deals with goods that cannot be rejected, and digital goods are not likely to be covered by this section.

<sup>337</sup> See Devenney (2018) *JBL* 505-507; this is comparable to the rights of the consumer in ss 54-56 of the CPA in South Africa.

### 6.5.3 *Services*<sup>338</sup>

Services must be performed with a reasonable degree of skill and care<sup>339</sup> and within a reasonable time.<sup>340</sup> Consumers do not have the right to reject services rendered but the trader must repeat the performance of the service or services within a reasonable time and without inconveniencing the consumer to a significant degree. If the trader cannot repeat the performance, or fails to do so within a reasonable time, or cannot do so without causing significant inconvenience to the consumer, the consumer is entitled to a price reduction.

### 6.5.4 *Concluding remarks: Remedies, dissatisfied consumers*

All of these remedies are additional to the consumer's common-law remedies.<sup>341</sup>

This position of a consumer, who wishes to access remedies in terms of consumer law in the UK, is similar to that in Singapore under the Lemon Law.<sup>342</sup> An analogous provision in the CPA would benefit South African consumers – and, in particular, consumers in section 14 fixed-term contracts.

Although jurisdiction and enforcement are not discussed in detail in this thesis, the next relevant aspect for consumers is how to seek redress and enforcement of their rights in terms of consumer law.

### 6.5.5 *Jurisdiction and enforcement*

When a consumer seeks redress in terms of a consumer contract, he or she will have to institute court action against the trader. However, in the UK, consumer law litigation is regarded as a last resort in resolving disputes.<sup>343</sup> Parties involved in a dispute should rather consider entering into negotiation or other form of ADR, even

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<sup>338</sup> Part 2 and Schedule 2 to the CRA apply to retail financial services. See <https://www.lexology.com/library/detail.aspx?g=f4d71703-0e55-4009-91b2-0f2c065b8ac6> (date of use: 20 March 2020); <https://www.fca.org.uk/publication/finalised-guidance/fg18-07.pdf> (date of use: 20 March 2020).

<sup>339</sup> Section 49 CRA which deals with the consumer's statutory rights under a service contract.

<sup>340</sup> Section 52 CRA; see Devenney (2018) *JBL* 508-510. This is similar to s 19 of the CPA which regulates the consumer's right to the delivery of goods or the supply of services; and s 54 which regulates the consumer's right to demand quality service. See Ch 4 para 4.3.3.4.

<sup>341</sup> See the discussion in para 6.3.5 above.

<sup>342</sup> Andrews *Enforcement* 214; see Practice Direction – Pre-action Conduct and Protocols available at [http://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd\\_pre-action\\_conduct#8.1](http://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct#8.1) (date of use: 8 September 2019) para 8. Also see Ch 5 para 5.3.2.7.

<sup>343</sup> Civil Procedure Rules and Practice Directions and Pre-action Conduct Practice Direction. For more information see <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-57ab-shorter-and-flexible-trials-schemes> (date of use: 13 August 2019); [https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd\\_pre-action\\_conduct](https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct) (date of use: 13 August 2019).

after having instituted litigation.<sup>344</sup> Forms of ADR available are mediation,<sup>345</sup> arbitration,<sup>346</sup> adjudication,<sup>347</sup> expert determination,<sup>348</sup> early-neutral evaluation,<sup>349</sup> and ombudsman schemes.<sup>350</sup>

There is no special small claims court in the county courts of England and in the sheriff courts in Scotland. Small claims are instituted in the county and sheriff courts respectively, regardless of the amount involved.<sup>351</sup> Courts must also consider if dispute resolution is possible, or suitable, at all stages of the proceedings.<sup>352</sup> Failing to use ADR could result in cost implications for the parties.<sup>353</sup>

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<sup>344</sup> Andrews *Enforcement* 214. The court can require proof that parties have tried to make use of ADR even after proceedings have been instituted.

<sup>345</sup> Mediation in the UK follows the EU trend, is facilitative, and is described as follows: '[T]he mediator does not express a judgment or view on any party's case but instead creates a voluntary, confidential environment where people involved in conflict are helped by a mediator as a neutral third party to resolve their problems collaboratively'. See Andrews *Enforcement* 1045.

<sup>346</sup> Arbitration is referred to in CRA, eg, in s 31(4). Arbitration in England and Wales is governed by the provisions of the Arbitration Act 1996. See Andrews *Enforcement* 1046 for a discussion.

<sup>347</sup> Adjudication is mentioned in Schedule 8 Part 1 to the CRA. Adjudication is similar to arbitration but is not governed by the Arbitration Act 1996. It is dealt with under an adjudication scheme. See Andrews *Enforcement* 1047 for a discussion of adjudication.

<sup>348</sup> Expert determination is not mentioned in the CRA. See Andrews *Enforcement* 1047 for a discussion. Expert determination is similar to adjudication but is rarely used in disputes between consumers and traders.

<sup>349</sup> Early neutral evaluation is not mentioned in the CRA. Andrews describes this as '... a process under which the parties submit their dispute for consideration to a suitably qualified and respected individual who will give the parties a decision as to what the outcome would, in his view, be if the matter were to go to Court'. See Andrews *Enforcement* 1047.

<sup>350</sup> Ombudsman schemes are not mentioned in the CRA. For more general information on these see Andrews *Enforcement* 1045-1047, 1094-1095. There are similarities to the position in South Africa under the CPA where there is provision for a Consumer Goods and Services Ombud, see <http://www.cgso.org.za/> (date of use: 26 January 2020).

<sup>351</sup> See Andrews *Enforcement* 217-219 for more information.

<sup>352</sup> The court can also direct parties to make use of 'early neutral evaluation', see *Seals and Seals v Williams* [2015] EWHC 1829 (Ch) 15 May 2015; Andrews *Enforcement* 215. There is no special small claims court in the county courts of England and the sheriff courts in Scotland – the claims are instituted in the county and sheriff courts respectively, regardless of the amount involved. See Andrews *Enforcement* 217-219 for more information. An interesting development in 2002, was an online claims service. See Andrews *Enforcement* 219-220. This forum of litigation could relieve pressure on the normal court system if used effectively and wisely. See the user guidance for more information available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/762843/mcol-userguide-eng.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/762843/mcol-userguide-eng.pdf) (date of use: 13 August 2019).

<sup>353</sup> Andrews *Enforcement* 216-217. The court has the discretion to deviate from this – eg, when considering the nature of the dispute, the merits of the respective cases, or where the costs of ADR would be very high.



Consumers can approach a variety of enforcement bodies to enforce their consumer-related complaints.<sup>354</sup> However, these bodies – and ombuds in particular – have been severely criticised for bad service to the public.<sup>355</sup>

UK case law is now discussed to establish if there are lessons to be learnt from the way these disputes are handled by the judiciary in the UK. Most of these judgments were decided under earlier legislation. However, the decisions remain relevant as courts will consult these judgments for guidance in future CRA litigation.

## 6.6 Case law

### 6.6.1 *The Office of Fair Trading v Ashbourne Management Services & Others*<sup>356</sup>

In *The Office of Fair Trading v Ashbourne Management Services and Others* the Office of Fair Trading<sup>357</sup> complained about certain practices by Ashbourne Management Services, who recruited members for various gyms and health and fitness clubs<sup>358</sup> using standard-form contracts and managing consumers' payments to these gyms.<sup>359</sup> The OFT entered into discussions with Ashbourne to amend the contracts to adhere to legislation, and the parties agreed that the final and approved version would be used to enter into agreements with consumers. Despite this, there were thirteen versions still in use.<sup>360</sup> The relevant aspect of this judgment is that the OFT deemed some of the contracts unfair in terms of the Unfair Terms in Consumer Contracts Regulations.

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<sup>354</sup> For example, the Local Authority Trading Standards Services Financial Conduct Authority, the CMA, Ofcom (Communication's Regulator), Trade and Investment in Northern Ireland) OFGEM (Office of Gas and Electricity Markets), OFWAT (The Water Services Regulation Authority), ORR (Office of Rail and Road), CAA (Civil Aviation Authority), Utility Regulator for Northern Ireland. See Practice Note Overview 91-92; Conway <https://researchbriefings.files.parliament.uk/documents/SN06759/SN06759.pdf> (date of use: 16 May 2019) 17; For consumer guidance on enforcement of consumer protection see [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/546521/cma58-consumer-protection-enforcement-guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/546521/cma58-consumer-protection-enforcement-guidance.pdf) (date of use: 15 August 2019); Andrews *Enforcement* 1015-1016.

<sup>355</sup> Cook <https://www.ft.com/content/510b5344-279b-11e8-b27e-cc62a39d57a0> (date of use: 19 May 2020).

<sup>356</sup> [2011] EWHC 1237 (Ch) (hereafter *Ashbourne*).

<sup>357</sup> Hereafter the OFT. The OFT was a non-ministerial department that existed from 1973 to 1 April 2014. It was responsible for protecting consumer interests throughout the UK. Upon its closure, its responsibilities were passed on to a number of different organisations such as the CMA (discussed in para 6.3.4.3.1.6 above).

<sup>358</sup> Hereafter 'gyms' for brevity.

<sup>359</sup> This case was decided under earlier legislation, but as it is based on fairness and deals with the fairness of longer-term contracts, it remains relevant.

<sup>360</sup> A detailed discussion of all the circumstances and facts in the case will not be possible and only the parts relevant to this thesis will be discussed.

The court found that in considering the fairness of a term in a consumer contract, regard should be had to the consumer involved, and, although the term 'average consumer' is well known in European consumer law,<sup>361</sup> the standard used to evaluate the consumer varies.<sup>362</sup> This standard should be adapted to suit the specific consumer in question, as the typical consumer is important for the consideration of fairness, and to evaluate whether a term is expressed clearly and intelligibly.<sup>363</sup>

The contracts further provided a minimum term for membership,<sup>364</sup> and the court decided that the clause describing the minimum term was clear and intelligible.<sup>365</sup>

The court decided that the test for fairness is:<sup>366</sup>

- Are the terms in a contract worded such that they result in a significant imbalance to the parties' respective rights and obligations?
- Are the terms and conditions so detrimental to the consumer that their inclusion is contrary to good faith?

The court considered various factors when deciding on fairness, for instance the consumer's overestimation of his use of the gym, the advantage of oversubscription to gyms, advice on the defendant's website, and the fact that the consumer is not made aware of all these factors. The court decided the defendants exploited these factors, and that the contracts,<sup>367</sup> specifically those in excess of twelve months, were weighted significantly against the consumer. This caused an imbalance in the parties' relationship which was sufficiently serious to qualify as contrary to good faith.<sup>368</sup> The court emphasised that consumers do not fully appreciate the detrimental effect of early termination of contracts.<sup>369</sup> It found that several aspects of the various standard-form agreements were unfair and did not comply with the requirements of the UTCCR and that Ashbourne was guilty of unfair commercial practices.<sup>370</sup>

The significant aspect of this judgment is the court's suggestion that traders should do the following to ensure a tie-in period would be regarded fair:<sup>371</sup>

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<sup>361</sup> *Ashbourne* para [128].

<sup>362</sup> *Ashbourne* para [128].

<sup>363</sup> *Ashbourne* para [128].

<sup>364</sup> Twelve, 24 and 36 months, *Ashbourne* para [129].

<sup>365</sup> *Ashbourne* paras [158]–[161].

<sup>366</sup> This is the test now reflected in the CRA.

<sup>367</sup> Those longer than 12 months' duration, see *Ashbourne* para [174].

<sup>368</sup> *Ashbourne* para [174].

<sup>369</sup> *Ashbourne* para [175].

<sup>370</sup> *Ashbourne* para [238].

<sup>371</sup> For the general discussion see *Ashbourne* paras [129]–[153]; Practice Note Overview 45.

- The trader should ensure in advance that the consumer is aware, either by information during the marketing process or during the order and negotiations, that he or she will be bound for a minimum term.<sup>372</sup>
- If the consumer commits to the agreement, the trader should make the risks involved very clear to him or her<sup>373</sup> and propose alternative options available to the consumer – eg, payments for individual visits – instead of a tie-in period.<sup>374</sup>
- The trader should consider the possibility that a consumer would possibly have to terminate the contract, for instance because of unemployment, illness, or a change in circumstances.<sup>375</sup>

This judgment in *Ashbourne* is important for the comparison to fixed-term contracts under section 14 of the CPA, as it provides guidelines on the establishment of fairness in agreements that bind the consumer for a tie-in period.<sup>376</sup>

#### 6.6.2 *Du Plessis v Fontgary Leisure Parks Ltd*<sup>377</sup>

Du Plessis bought a caravan stand in 2006 for £36 500. The annual pitch fee<sup>378</sup> at that time was £1 692.<sup>379</sup> The park owner spent money to upgrade the park, graded the stands,<sup>380</sup> and gave due notice of the grading and increase in pitch fees to the owners. Stand owners were given the option of moving their caravans to stands with a lower-graded pitch attracting more affordable pitch fees. Because of the grading process, Du Plessis's annual contribution was raised.<sup>381</sup> She refused to pay this amount and removed and sold her caravan. Du Plessis based her claim on a number of grounds which the court *a quo* found to be without merit. The court reduced her claim to one for damages based on the wrongful termination of contract.<sup>382</sup>

The court *a quo* found that when considering all the factors set out in the pitch agreement, Fontgary was entitled to the increase in fees it had charged and that Du Plessis's failure to pay the increased pitch fee was a breach of contract. Du Plessis appealed on the following grounds:

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<sup>372</sup> *Ashbourne* para [171]. This is an example of information-based consumer protection that improves transparency.

<sup>373</sup> *Ashbourne* para [171].

<sup>374</sup> This is another example of information-based consumer protection that improves transparency.

<sup>375</sup> *Ashbourne* paras [164], [167].

<sup>376</sup> See para 6.6.5 below.

<sup>377</sup> [2012] EWCA Civ 409 (hereafter *Du Plessis*). This case was accessed on Westlaw @ 2019 Thomson Reuters and does not contain paragraph numbers or the correct page numbers. I therefore use the page numbers on the Westlaw version for reference purposes.

<sup>378</sup> This is the term used for the annual fee payable in terms of the agreement.

<sup>379</sup> All owners paid the same pitch fee, whether the stand had a sea view or not.

<sup>380</sup> *Du Plessis* 9. Based on the size and the quality of location of the particular stand.

<sup>381</sup> The fee was raised to £2160. Fontgary offered to buy back Du Plessis's caravan for £16 000.00 – she refused, removed her caravan, and sold it for £14 000 so suffering financial loss.

<sup>382</sup> *Du Plessis* 9.

- the aspects which Fontgary had considered when reviewing pitch fees did not fall within the scope of clause 7d of the licence agreement;<sup>383</sup>
- if found to be within the scope of regulation 7d of the UTCCR, the clause was unfair within the provisions of the 1999 Regulations; and
- the effect of the arbitration provisions in the agreement.<sup>384</sup>

The court considered whether clause 7d created an imbalance in the parties' respective rights detrimental to Du Plessis. It decided against Du Plessis as the clause reflected a carefully weighed and considered review procedure of the annual licence fees.<sup>385</sup> The contract provided for a three-month notice period of an increase – which Fontgary had given. In addition, Fontgary had even offered to move the caravan to a cheaper site free of charge. The contract further obliged the defendant to give reasons for the increase (excluding factors such as increase in profits) which Fontgary had done; and any individual owner could challenge such increase. The court found that clause 7d was not an unfair term within the 1999 Regulations as it did not entitle Fontgary to increase the fees unilaterally without providing valid reasons.<sup>386</sup> The court also found that the grading of sites had been done fairly. The court held that the 1999 Regulations applied, that clause 7 was a fair term, and therefore dismissed that element of Du Plessis's appeal.<sup>387</sup>

It is submitted that this is the correct decision and that the court weighed up all relevant factors in deciding on fairness. This sets a good example for South African courts to follow in disputes based on fairness or contract terms.<sup>388</sup> A similar case, where a contract was amended by the trader, will be discussed next.

#### 6.6.3 *Rochdale Borough Council v Dixon*<sup>389</sup>

In the judgment of *Rochdale Borough Council v Dixon*, Rochdale let a property to Dixon. In the original contract the charges for water was payable to Rochdale who paid it to the relevant water authority. Rochdale subsequently amended this agreement<sup>390</sup> so as to provide that the water fees were to be paid directly to the water authority. Dixon refused to pay the water accounts directly to the water authority on a number of grounds.<sup>391</sup> The ground relevant to the present discussion was that he considered the variation of the water payment clause unfair. The court *a quo* decided against Dixon and he appealed. In deciding whether the clause was

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<sup>383</sup> *Du Plessis* 9.

<sup>384</sup> Not relevant for purposes of this discussion.

<sup>385</sup> *Du Plessis* 13.

<sup>386</sup> *Du Plessis* 13.

<sup>387</sup> *Du Plessis* 13.

<sup>388</sup> See para 6.6.5.

<sup>389</sup> [2012] PTSR 1336 (hereafter *Rochdale*).

<sup>390</sup> *Rochdale* 1336.

<sup>391</sup> *Rochdale* 1337.

unfair in terms of the 1999 Regulations, and to establish whether Rochdale had followed the correct procedure, the court considered the following factors:<sup>392</sup>

- Was there a significant imbalance in favour of Rochdale to an extent which tipped the contract in its favour? The court found that there was no such imbalance.<sup>393</sup>
- Was there good faith and openness in varying the term? The court found there was as the term was authorised by a statutory power<sup>394</sup> and Rochdale had followed the correct procedure in varying the term.<sup>395</sup>
- Rochdale had not taken advantage of the tenants.<sup>396</sup>
- Whether the dilemma Dixon found himself in was a result of his refusal to pay for the water service he had used and enjoyed, although he was able to do so, and not because of the amendment of the tenancy agreement.<sup>397</sup>

Again, the court here adopted a balanced and fair view. The judge considered the facts of the case, several matters not relevant to this thesis, and the unfair terms issue in which he examined twelve factors<sup>398</sup> to establish whether Rochdale's conduct could amount to creating a significant imbalance. In addition, nothing in Rochdale's conduct was found to be contrary to the requirement of good faith.<sup>399</sup> The court correctly dismissed Dixon's appeal.<sup>400</sup>

#### 6.6.4 *ParkingEye Limited v Beavis*<sup>401</sup>

In *ParkingEye Limited v Beavis*, Beavis parked his vehicle in a car park. The conditions for parking there were, amongst others, that parking was free for two hours, and after two hours an amount of £85 was payable.<sup>402</sup> These conditions were brought to the attention of consumers by way of a large notice board at the entrance to the parking area, and by additional notices inside the parking area. By parking in the car park, Beavis consented to these conditions. Beavis only left the car park after two hours and 56 minutes and ParkingEye demanded payment of the £85. Beavis objected to this on a few grounds; the only ground relevant to this discussion is whether charging £85 in the parking agreement violated the provisions of the 1999

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<sup>392</sup> *Rochdale* 1339-1340.

<sup>393</sup> *Rochdale* 1358-1359.

<sup>394</sup> *Rochdale* 1357-1359.

<sup>395</sup> *Rochdale* 1358-1359.

<sup>396</sup> *Rochdale* 1358-1359.

<sup>397</sup> *Rochdale* 1359.

<sup>398</sup> *Rochdale* 1358-1359.

<sup>399</sup> *Rochdale* 1359.

<sup>400</sup> *Rochdale* 1361.

<sup>401</sup> [2015] UKSC 67, 2015 WLR 1373 (hereafter *Beavis*). See Beale *Chitty on Contracts* 2<sup>nd</sup> cumulative supplement 38-251A for a discussion and for the view of the minority; MacDonald & Atkins *Law of Contract* 232-234.

<sup>402</sup> This amount was reducible to £50, if paid within 14 days. £85 was the equivalent of approximately R 1800 on 18 June 2020.

Regulations. Beavis alleged that this condition was unfair in that no distinction in cost was drawn between a consumer who was one minute late and one who was one hour late.<sup>403</sup> Beavis's appeal was dismissed as the majority of the court confirmed the judgment of the Supreme Court that:<sup>404</sup>

- The provision that latecomers had to pay a fixed charge was a simple and straightforward condition. The condition was clear and given to the consumer in advance.<sup>405</sup>
- The condition in question, although it caused a significant imbalance between the rights and obligation of the parties, especially as the consumer had the advantage of parking in the car park free for two hours, was fair. In determining fairness, the court considered the purpose of the charge and concluded that it aimed to manage the parking spaces available by making efficient use of the parking for potential shoppers, and also, to ensure income for ParkingEye to cover its costs and profit from the service to customers.<sup>406</sup>
- In addition, the amount in question was not disproportionately high, the amount charged was not against good faith and also not prejudicial to the consumer.<sup>407</sup>

This decision serves as an example that terms provided in the grey list in Schedule 2 of the CRA could be found fair when all circumstances have been considered.<sup>408</sup> South African courts should take cognisance of well-considered UK decisions such as *Beavis*.

#### 6.6.5 Concluding remarks: UK case law

All of the factors considered by courts in the judgments above could be relevant in deciding on fairness when evaluating whether the duration of a fixed-term contract is fair.<sup>409</sup> The case law in the UK was decided correctly taking all relevant circumstances into account. All relevant documentation was considered at length, and although all the judgments discussed above went against the consumer, it is submitted that they were correct. The effect of these decisions is not to limit the rights of traders unnecessarily, as this could be detrimental to both traders and the economy. The balance of rights and obligations between the parties must be fair in

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<sup>403</sup> Also see *Aziz* on the consideration of unfair terms paras [65]–[76].

<sup>404</sup> For a well- balanced review of the case, see Samuels 2015 *Legal Update Commercial* 12-13. For an opinion criticising the judgment see Morgan (2016) *CLJ* 11-14.

<sup>405</sup> This relates to the transparency requirement. See *Beavis* para [100].

<sup>406</sup> *Beavis* para [107].

<sup>407</sup> *Beavis* paras [104]–[107].

<sup>408</sup> *Beavis* para [105].

<sup>409</sup> Especially in South Africa, under s 14 of the CPA – if, and when the duration of contracts is not limited.

order to pass the reasonable and fair test. The lessons to be learnt from these decisions are:

- to consider all factors in the context of the contract;
- detailed decisions which give in-depth reasons for deciding on the fairness or other merits of a dispute are required;
- the parole evidence rule is excluded by implication in certain sections of the CRA;<sup>410</sup>
- these decisions are fair despite the presumption in UK consumer law in favour of the consumer in cases of ambiguity;
- the decisions protect and promote business by being fair, and in the long term this will be to the advantage of the consumer;
- The fact that EU Directives, Guidance, and case law must be considered provides valuable guidance to UK courts<sup>411</sup> and, of course, contributes to effective legal comparison in judgments.<sup>412</sup> This, in turn, creates legal certainty as there is a measure of predictability for consumers and traders.<sup>413</sup>

I conclude by considering the advantages and disadvantages of relevant consumer law related to fixed-term type contracts in the UK, and compare these to the situation under the CPA.

### 6.7 Conclusion: Chapter 6

Although it represents a distinct improvement on the previous position in the UK, it is difficult at this early stage to judge whether the CRA achieved the purposes and addressed the shortcomings that were the main reasons for enacting it.<sup>414</sup> Generally, as it is relatively new, there are not many detailed publications, opinions, or cases on the effect of the CRA in practice. Devenney contends that the CRA has brought significant benefits to the consumer-law regime in the UK.<sup>415</sup> The fairness test in Part

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<sup>410</sup> See the discussion in para 6.3.6 above.

<sup>411</sup> Although it can be argued that this adds to the fragmentation and incoherence of law and case law as more systems or sources must be considered. This could lead to a delay in delivering judgments and extend the duration of hearings.

<sup>412</sup> This could also be cumbersome as such a large volume of case law must be studied and considered by legal representatives and courts before coming to a decision.

<sup>413</sup> In SA predictability (with specific reference to fairness) is still lacking to such an extent that traders do not know how to act. Most of the factors that must be considered under s 52(2) of the CPA in deciding on the fairness of a transaction or agreement are subjective (which also complicates predictability). See Stoop *LLD* 216-218.

<sup>414</sup> See para 6.3.2 above.

<sup>415</sup> Devenney argues that the reform in consumer law in the UK achieved the following results:

- A better differentiation between consumer and commercial contracts,
- A more consistent use of the same terminology across consumer law legislation and Regulations,

2 of the CRA adds considerable value.<sup>416</sup> And although the consolidation process is still open to criticism and unavailable as a single Act, it is an improvement on its predecessor.<sup>417</sup>

When compared to the consumer law regime in Singapore and South Africa, the UK source materials – the CRA, the Regulations, EU Directives, and EU case law – remain fragmented and complicated, and it is difficult to establish the position on a certain aspect without consulting approximately ten sources. Whether the CRA and the applicable regulations and EU Directives will be applied and enforced evenly (post Brexit) can only be answered in time as it is too early to evaluate this aspect with certainty.

The main advantages of the CRA and the UK consumer-law regime, in general and relating to fixed-term contracts, are:

- It keeps pace with modern technology, for example, provisions governing digital-content contracts.
- The Explanatory Notes issued by the legislature assist in interpreting and applying the CRA.
- The Guidance issued is useful and comprehensive for all market sectors, including consumers.
- Everyone can access the Explanatory Notes and Guidance on the internet.
- The fact that courts in the UK can consult a wealth of EU consumer-law cases widens the field of expertise and sources available to courts.<sup>418</sup>
- The UK retains common-law rights and remedies in most circumstances for both parties, and this could potentially benefit both parties and assist courts in reaching fair decisions.
- The continued importance of the principle of the freedom of contract and the function of the free market in the economy as reflected in the CMA Contract Terms Guidance 2015 is advantageous, specifically when used in the core exemption.<sup>419</sup>

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- The unification of the law on the supply of goods to consumers,
  - The refinement of particularly problematic aspects of consumer law,
  - The modernisation of consumer law to provide for aspects such as contracts for digital content,
  - The provision of private redress remedies to consumers for unfair commercial practices by traders, and
  - Overall, a consumer law system that is consolidated and harmonious.

He also highlights a few disadvantages. See Devenney (2018) *JBL* 510-511.

<sup>416</sup> For example, when introducing a similar provision for s 14 could be useful – when specified maximum duration is abolished.

<sup>417</sup> Beale *Chitty on Contracts* vol II 38-196.

<sup>418</sup> This could, of course, also be a disadvantage given the sheer volume of case law that must be studied and considered by practitioners and courts.

<sup>419</sup> See para 6.3.4.3.1.5.



## The Law of the United Kingdom: Consumer protection and fixed-term agreements

- UK consumer law does not limit the duration of fixed-term contracts, but rather makes use of fairness to assess the balance of rights and obligations between parties, this is of considerable importance to consumers.
- Consumers have a 30-day right to reject goods and this promotes fairness and balances unequal contractual power.
- Unfairness can be considered in all consumer contracts and notices – this is an advantage, especially as the court may consider terms for fairness *mero motu* – even during the enforcement stages of proceedings.
- The parol evidence rule does not apply in prescribed circumstances and the court can take notices and other circumstances into consideration to reach a fair decision. This works to the advantage of the consumer as he is normally in an inferior bargaining position. Allowing additional evidence to prove the circumstances surrounding the conclusion of the agreement would most likely benefit the consumer and improve access to justice.
- Consumers in time-share contracts can cancel by giving fourteen days' notice when payment of the second or later instalment is due.
- Although lease agreements of immovable property are covered only by Part 2 of the CRA, there is no section or provision which limits the duration of leases, whether in respect of movable or immovable property. Also, to further protect consumers in lease agreements, the CRA compels letting agents to publicise their fees.

The shortcomings of the CRA and consumer-law legislation in the UK generally and in respect of fixed-term contracts are:

- The legislation and Regulations are lengthy and difficult to read – even after the consolidation efforts neither the Act nor the consumer regime can be described as 'straightforward'.
- The fact that the Act applies differently in different areas of the UK and that terminology differs in these areas, as well as certain sections not applying in certain parts of the UK complicates the understanding and application of the CRA.<sup>420</sup>
- The fact that EU Directives were brought in, in addition to UK law, results in a lengthy, bulky, and fragmented consumer law regime.<sup>421</sup>
- Because EU legislation was introduced into UK consumer law and legislation only recently, Brexit will complicate the certainty regarding the position, continued relevance, and the continued effect of EU consumer-law measures.

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<sup>420</sup> Explanatory Notes para 26.

<sup>421</sup> Although there could be advantages as courts and practitioners have a wider field of reference.

The importance of this comparison for the position of a consumer in terms of a section 14 of the CPA contract lies in the following aspects:

- UK consumer law is not as prescriptive and rigid as the CPA in that it does not prescribe a specific maximum duration for fixed-term contracts. This is important as it could be to the advantage of a consumer to have a longer-term lease agreement.<sup>422</sup>
- The consumer has a 30-day period in which to cancel or state dissatisfaction.
- The consumer is empowered and has effective rights he or she can exercise, for example, section 28(3), read with section 28(6) expressly entitles the consumer to terminate the agreement when delivery has not been effected in accordance with the contract.
- The consumer does not have to give 20 days' notice to cancel an agreement based on defective or non-performance by the trader and is not liable for instalments or penalties during the notice period if these are a result of breach by the trader.<sup>423</sup>
- The consumer is protected in all instances by the fairness test,<sup>424</sup> transparency, and good faith in Part 2 of the CRA.
- The time-share right of the consumer to cancel from the second or later instalment by giving fourteen days' notice is an advantage, as the consumer will not be bound for an extended or unlimited period.<sup>425</sup>
- The fact that the parol evidence rule does not apply in all circumstances should also benefit the consumer, as the consumer is normally in an inferior bargaining position and it would therefore be to his or her advantage to point out and provide testimony or proof of surrounding circumstances.

The position of the trader in the South African regime differs from the position of a trader in the UK in the following respects:

- Traders' rights are theoretically better protected in South Africa, as the parol evidence rule will normally benefit the trader, and the parol evidence rule applies in South Africa.
- Traders in South Africa are better protected in terms of section 14 as they have an unfair advantage when the consumer is liable to give notice and remains liable for interim payments where the breach was caused by the default or defective performance by the trader.
- A trader in the UK can enter into longer-term agreements, for example lease agreements, which could be to his or her advantage when compared to the position of the trader under section 14 of the CPA.

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<sup>422</sup> See, eg, guidelines provided in *Ashbourne* para 6.6.1.

<sup>423</sup> Section 14 CPA.

<sup>424</sup> Section 52(1)(b) of the CPA; Ch 4 para 4.3.2.6.

<sup>425</sup> In contrast to the position in South Africa. See Ch 4 para 4.2.3.9.

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- The trader in the UK is also well protected by the fairness principle, and judgments decided in favour of traders illustrate this, despite the presumption in favour of consumers in cases of ambiguity.<sup>426</sup>
- The free market and freedom of contract principles are protected in the UK to a certain extent, by the core exemption in section 64 of the CRA. There are no similar exemptions in the CPA.

The completion of the analysis, comparison, and conclusion on consumer protection legislation relevant to fixed-term contracts in the UK, enables me to conclude this study. In Chapter 7, I highlight the findings of this study and provide two tables to represent the best practice regarding specific aspects analysed in this study in visual terms. After that, I illustrate the findings of this study by analysing a very simple set of facts after which I conclude by offering recommendations to improve the position of consumers in a fixed-term contract under section 14 of the South African Consumer Protection Act.

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<sup>426</sup> See para 6.6.5 above.

**CHAPTER SEVEN Conclusion and recommendations**

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## CHAPTER SEVEN: Conclusion and recommendations

### 7.1 Introduction and general remarks

Consumer protection is the cornerstone of a fair, modern, and competent economy and market place. It aims to ensure competitiveness,<sup>1</sup> instill confidence in consumers, and enable businesses to thrive.<sup>2</sup>

In Chapter 2, I briefly set out the history and philosophy behind consumer principles and policies of consumer protection as a prelude to the analysis of pertinent common-law of consumer contracts in Chapter 3. In Chapter 4 I considered the regulation of fixed-term agreements under the CPA and compared the position of both the consumer and supplier in fixed-term agreements under the CPA with their position under the common law. Chapters 5 and 6 saw an examination and comparison of fixed-term contracts in Singapore under the CPFTA, and the UK under the CRA, respectively. This was aimed at establishing whether the consumer-law regimes of these two foreign jurisdictions had anything to offer in improving South Africa's consumer protection under the CPA in the focus area of this thesis. A detailed analysis of all aspects of contract law under fixed-term contracts falls outside the scope of this thesis and only the aspects specifically highlighted in Chapter 1 and at the beginning of each chapter have been addressed.

Although the Constitution is of paramount importance from a South African perspective, legal comparison of the constitutional aspects and ideals of South African consumer law and those of Singapore and the UK, is untenable in that the South African ideal of transformative constitutionalism is not shared by Singapore and the UK.<sup>3</sup> The constitutional aspect is essential to the interpretation of the common law and the CPA in a South African context and had to be taken into account for purposes of Chapters 3 and 4 of this thesis. The absence of a constitutional goal in Singapore and the UK does not affect the outcome of the thesis. This is because the principal problems generated by section 14 arise from the limitation of the freedom of contract as regards the duration of fixed-term agreements, and in the lack of protection under section 14 for the consumer when a supplier is guilty of material default. The CPFTA and the CRA do not limit the duration of fixed-term contracts and neither of these Acts has a provision akin to section 14. This is a further validation of the comparison of these three jurisdictions as it points clearly to the conclusion that section 14 is at best superfluous – if not excessive – and in fact acts to the disadvantage of the very people it seeks to protect and benefit.

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<sup>1</sup> Thus, the strong link to competition law. See Ch 2 para 2.4.2; Ch 4 para 4.2.2.3; Ch 5 para 5.1; Ch 6 para 6.3.4.3.1.6.

<sup>2</sup> Preamble and foreword to *Green Paper*. See Ch 4 para 4.2.2.3.

<sup>3</sup> Also see in this respect Bhana *PhD* 241.

Many useful lessons emerged from the comparative study of Singapore and the UK's statutory consumer-law regimes, both section 14-specific and to South African consumer protection legislation in general.

After highlighting the most relevant findings of the study, I preset them in summary form as a table for easy reference. These findings are then used to illustrate – by way of a basic problem – the practical implications by virtue of the rights and remedies provided under the common law, under section 14 of the CPA, in terms of the CPFTA in Singapore, and in terms of the CRA in the UK. This, in turn, enables me to identify best practice. The thesis closes with a presentation of the conclusions drawn from the study and recommendations to address the shortcomings in the fixed-term contract regime in South Africa under the CPA.

### 7.2 Findings<sup>4</sup>

From the historic-philosophical study in Chapter 2 it emerges clearly that technological advances, mass production, the increase in the number of products and services available to consumers, and the increasingly remote nature of transactions, have rendered consumers more vulnerable to problems related to quality, safety, and the availability of remedies. This increased vulnerability of consumers internationally spearheaded a shift to consumer activism and awareness among governments of the need to protect consumers. It became clear that despite consumers' duty to inform themselves and make rational decisions in concluding agreements, they still required the protection which could be offered by consumer organisations and consumer legislation to promote fairness and protection, prevent exploitation, and provide protection once exploitation had taken place.

This led to a waning of the individualist theory and emphasises that the application and interpretation of the principle of freedom of contract impacted unfairly on vulnerable consumers. Furthermore, the strict interpretation of freedom of contract by courts, their rigid application of *pacta servanda sunt*, and the potential detriment this held for vulnerable consumers contributed to an awareness of the shortcomings of individualism. This led, in turn, to a shift towards collectivism and resulted in, amongst others, consumer protection measures. As a result, legislatures the world over intervened with measures to protect consumers.

However, despite the decline in support for the freedom of contract principle, and the move towards improved consumer protection, the standard-form contract thrived as it was shown to be cost effective and to save suppliers time. It was soon realised that the mere fact that a consumer had signed a standard-form agreement, in no way meant that he or she had read, and still less understood, the contract. Standard-form contracts, boilerplate, and contracts of adhesion, are all manifestations of the demise of the ideals of freedom of contract, individualism, free

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<sup>4</sup> Cross references to the discussion of all the different aspects mentioned in the findings are provided in Tables A and B in para 7.3 where these aspects are compared and best practice recommended.

and open negotiation, equal bargaining, and ultimately, the sanctity of contracts. At the same time, they signal the rise of collectivism. However, despite these criticisms, standard-form contracts remain a reality which have an important impact on the economy – they affect the rights of sellers or suppliers, and ultimately affect the consumer. All this emphasised the need for consumer protection measures.

In Chapter 3, I analysed the South African common law relating to fixed-term contracts. From this analysis, it emerged that the common-law of contract is governed by Roman law principles, Roman-Dutch writers' texts, South African case law, and principles of English law. Breach of contract, rescission, specific performance, and damages are equally well regulated by principles, maxims, exceptions, and sources to promote and ensure the fair and reasonable treatment of parties to an agreement on the breach and/or rescission thereof. These principles have developed over centuries and have been refined to provide fair treatment for almost every eventuality.

Adding value to these already well-developed and historical principles of fairness, are the beneficial effects of more recent factors in the form of the Constitution of the Republic of South Africa, 1996, its Chapter 2 – the Bill of Rights – and the concept of ubuntu. As illustrated in Chapter 3, there are shortcomings in some areas of the common law, mainly in the form of contradictory judgments and the incorrect interpretation of statutes and Roman and Roman-Dutch principles. The advantages are that it is a sophisticated and equitable contract-law regime which aims to protect both parties in equal measure, and allows the courts the discretion to develop the law within bounds of the Constitution and public policy. The common law remains relevant as the common-law regime is expressly preserved in section 2(10) of the CPA, and all agreements – whether under the common law or in terms of legislation – are regulated by the common-law of contract.

In recognition of the international move towards consumer protection, the South African legislature enacted the CPA, which is the topic of study in Chapter 4 of this thesis. Under the CPA, the supplier drafts his or her own section 14 standard-form agreement on his or her own terms. He or she is well-protected by section 14 and is entitled to payments up to the date of cancellation. In addition, a supplier may impose a penalty in his or her discretion, using the guidelines provided in section 14(4) and regulation 5 – which are neither prescriptive nor clear – even when he or she is guilty of default or lack of performance. Conversely, the consumer may, on 20 days' notice to the supplier, cancel the agreement at any time without providing reasons for his or her decision. This clearly interferes with the supplier's common-law rights in respect of the *pacta servanda sunt* maxim, and is a disadvantage to the supplier.

The consumer, who is in an unequal bargaining position, must accept the terms of the supplier's standard-form agreement, and this is who section 14 specifically aims to protect. But, unfortunately, section 14 of the CPA does not expressly give him or her active rights to enforce his or her rights, neither are there sufficient protection

measures for the consumer in the section – save for the right to cancel at any time by giving 20 days' notice. Because of his or her inferior bargaining position, the consumer will not be able to include the common-law protective measures generally available to purchasers in the agreement. However, in terms of section 2(10) of the CPA he or she retains these common-law rights, and can choose when enforcing his or her rights either the CPA or the common-law of contract as the basis of the claim.

The main disadvantages of section 14 of the CPA, are the limitation on the duration of the agreement in terms of section 14(3) read with regulation 5, and the fact that the exception to this maximum limitation on duration in section 14(4) offers no guidance on how the supplier must prove advantage to the consumer of a longer duration. In addition, the provision is unclear as to when exactly the supplier has to prove or record the advantage. As far as could be established this aspect has not been the subject of litigation. Section 14 does not provide the consumer with the right summarily to cancel or repudiate the contract in cases of non-performance or default by the supplier in that section 14(2)(b)(i)(bb) still requires him or her to give 20 days' notice. Furthermore, he or she remains liable for payments under the agreement for the 20-day notice period. In addition, he or she is liable under section 14(3) read with regulation 5, for a reasonable penalty when he or she cancels in terms of section 14(2)(b)(i)(bb) even when cancellation is based on the supplier's default or non-performance. There is no formula for the calculation of the reasonable penalty, and also no sliding scale based on the duration of the contract or the amount at stake to provide guidance or certainty as to the amount the consumer will have to pay. A further disadvantage is that smaller juristic persons are not protected as consumers under section 14(1) when the contract is entered into between juristic persons. This exclusion deprives small juristic persons of the protection afforded to consumers under section 14 in these circumstances, and could be a serious disadvantage as they can also be vulnerable or in a less favourable bargaining position.

Secondary disadvantages of the CPA's provisions for fixed-term and other agreements are that the consumer must follow the sequence of procedures in section 69 before turning to the courts. The only way in which a consumer can access a court directly is by way of section 52 when the dispute is based on unfairness. However, here too the right of access is limited by section 52(1)(b) which typifies such action as a remedy of last resort. The position in terms of section 2(10) which retains consumers' common-law rights is also not clear in some regards and needs to be clarified. Notable here, is whether suppliers also retain their common-law rights. The effectiveness of bodies and courts to effect dispute settlement, the improved implementation of responsible transformative constitutionalism that is sustainable and does not disadvantage the consumer, and the improved financial literacy of consumers, are also factors that could greatly contribute to an improvement in the consumer sphere.



The important advantage of section 14(2)(b)(i)(bb) for the consumer is that he or she can cancel the agreement at any time under the section and so is able to avoid the negative aspects arising from the application of the common-law maxims of *pacta servanda sunt* and *caveat emptor*, or his or her inferior bargaining position.

Secondary advantages of the CPA are the limited application of the parol evidence rule. However, the total abolition of the parol evidence rule in consumer-related cases is preferable, as consumers are in an inferior bargaining position and would benefit from presenting all evidence in disputes. Other positive factors in the CPA are the retention of the common-law rights of the consumer in section 2(10), the fairness provisions in Chapter 2, Part G, and the plain language provision in section 22. In addition, the CPA aims to comply with the United Nations Guidelines for Consumer Protection, and has resulted in an overall improvement in consumer protection when compared to South Africa's previous dispensation.

Moving abroad to Singapore in Chapter 5, the purpose of that country's consumer legislation – the CPFTA – is neither ideological nor socio-political. An analysis of the deceptively simple purpose of the CPFTA and its effect, interpretation, and implementation, shows that the Act, together with the UCTA where applicable, the improved investigative and proactive powers of the Commission, the CASE, and decisive court adjudication, have empowered and improved protection for consumers. The maxim *caveat emptor* still applies, as does the application of *pacta servanda sunt* in certain circumstances. The CPFTA does not limit the duration of contracts and empowers consumers with effective rights, education and information and stays true to purpose. The fairness provisions are effective and the Lemon Law protects consumers when goods do not conform to contract. The CPFTA, and especially the CASE, provide consumers with assistance and information and ensure just and equitable fair-trading circumstances for traders. The fact that section 18A of the CPFTA vests the burden of proof in the supplier when a consumer lodges a complaint, is also an advantage and an important lesson to be learnt from this jurisdiction. The proactive and improved enforcement powers of the Commission, the name-and-shame policy, and continued supervision of errant suppliers are also all positive aspects of the Singaporean system.

The disadvantages of the CPFTA in Singapore as regards fixed-term agreements, and in general, are the financial limitation of claims under the CPFTA, and the lack of criminal sanctions against perpetrators. In addition, the alleged overlap between the definitions and provisions of the CPFTA and the Lemon Law, and the lack of protection for smaller businesses as consumers under the CPFTA, could also be improved.

In Chapter 6 the focus turned to an analysis of the CRA relating to fixed-term contracts in the UK. There has been a definite improvement of the position under the CRA compared to the previous disposition. However, at this early stage in the implementation of the CRA, and with Brexit further complicating matters regarding the future status of the EU Directives, Guidelines, and case law, it is difficult to

evaluate whether the CRA has achieved its purposes and adequately addressed the shortcomings which necessitated its enactment. The consolidation of the consumer regime can still be criticised, but is an improvement on the previous dispensation – its continued fragmentation notwithstanding. There is no provision similar to section 14 of the CPA, and there is no limitation on the duration of contracts. Guidelines have, however, emerged in case law – eg, in *Ashbourne* – for establishing what a reasonable and fair duration will be. Further advantages of the CRA are that it keeps abreast of modern technology, the Explanatory Notes and Guidance provided are extremely useful in practice, and the Act retains common-law rights and remedies. The continued importance of freedom of contract in certain circumstances, such as in the core exemption, is a further advantage. And fairness is well-regulated and can be considered *mero motu* by courts under section 71(2) of the CRA at all stages in the proceedings. The parole evidence rule is also not applicable in certain prescribed circumstances, and the time-share provisions are beneficial to consumers. In addition, section 28(6)(b) and (c) of the CRA provides the consumer with the right summarily to cancel the contract when the supplier does not deliver or does not deliver timeously. The fact that UK consumer law is infused by EU consumer law and EU Directives is a mixed blessing. While it provides a wide spectrum of sources for the judiciary to consult, it can also be regarded as a disadvantage as it is cumbersome to establish with certainty what the position on a certain aspect in law is.

Overall, the findings in all the regimes studied – the common law and the CPA in South Africa, the CPFTA in Singapore, and the CRA in the UK – point to the fact that the over-regulation of contractual terms and a lack of freedom of contract can do more damage to and disadvantage the very people the legislature aims to protect. This is not to imply that I do not regard consumer protection legislation essential, merely that the way in which the legislation is drafted and applied is vital, especially from the point of view of the consumer. Flexibility is always an advantage, and the rigidity and limitations in section 14 of South Africa's CPA hold little benefit for the consumer.

I have compiled two tables to capture and illustrate the essence of the outcome of the thesis and highlight some of the aspects studied and observed. Table A reflects mainly the essential aspects of section 14 and fixed-term contracts, and table B contains other observations relevant to fixed-term agreements and consumer protection in general – but which could, of course, also affect the interpretation and adjudication of fixed-term contracts in certain circumstances. The distinction between these factors is not always clear, and in certain circumstances the factors in Table B can be essential to the rights of parties to a fixed-term consumer agreement. The factors were organised in two tables merely to effect a more orderly depiction of the findings.

### 7.3 Tables to summarise findings<sup>5</sup>

#### 7.3.1 Table A

Aspect studied	Best practice system/s	Recommendation/s
Statutory fixed-term limitation. <sup>6</sup>	<ul style="list-style-type: none"> <li>• Common law.</li> <li>• UK and Singapore.</li> </ul>	Abolish the limitation on the duration of fixed-term contracts under the CPA, as there are other ways to achieve fairness, eg, the fairness provisions in the CPA. In any event, under section 14(2)(b)(i)(bb) the consumer is entitled to terminate the agreement at any time, so the limitation is obsolete and could potentially disadvantage both the supplier and the consumer.
Giving of notice and payment of instalments during notice period based on repudiation <sup>7</sup> or breach of contract <sup>8</sup> by the supplier. <sup>9</sup>	<ul style="list-style-type: none"> <li>• Common law.</li> <li>• Singapore.</li> <li>• UK.</li> </ul>	A reasonable notice period when the seller breaches the contract, eg, 14 days should be sufficient. Consumers should under no circumstances be liable for payment of any amount during the prescribed notice period if the cancellation is based on a valid reason for cancellation, eg, breach by the trader.
Right of consumer to cancel immediately	<ul style="list-style-type: none"> <li>• Common law (based on repudiation).</li> <li>• UK – section 28(6).</li> </ul>	Consumers should never have to give a prescribed period of notice if based on default or non-performance by the supplier, and

<sup>5</sup> Aspects relevant to fixed-term contracts under s 14 of the CPA observed in the course of this thesis are mentioned in this table in no specific order, whether strictly speaking integral to fixed-term contracts, or merely relevant to the interpretation or application thereof in a more indirect way. This table is not by any means a full representation of all aspects analysed and discussed in the thesis, and merely aims to highlight a few important aspects.

<sup>6</sup> See Ch 4 para 4.2.3.7.9; Ch 5 para 5.3.2.1.2; and Ch 6 para 6.3.8.

<sup>7</sup> See Ch 3 para 3.3.3 for a discussion of repudiation, as the remedy for repudiation differs from other forms of breach of contract, in that it establishes anticipatory breach, and entitles the innocent party to cancel the contract without giving notice to the other party.

<sup>8</sup> See Ch 3 paras 3.3.1, 3.3.2 and 3.3.4 for breach of contract where the innocent party has to give notice.

<sup>9</sup> See Ch 4 para 4.2.3.7.7; Ch 6 para 6.3.8.

Aspect studied	Best practice system/s	Recommendation/s
when seller defaults or fails to perform.	<ul style="list-style-type: none"> <li>Position in Singapore not as clear.</li> </ul>	<p>should not be liable for payments and charges during the notice period. In addition, no penalty should be payable to the supplier.</p> <p>A provision similar to section 28(6) of the CRA should be enacted in the CPA.</p>
Time-share. <sup>10</sup>	<ul style="list-style-type: none"> <li>UK.</li> </ul>	<p>Equal payments and an annual right to cancel from the second instalment onwards should be enacted (as in the UK) to improve the protection of consumers and prevent them from being bound for an unreasonably long period.</p>
Leases. <sup>11</sup>	<ul style="list-style-type: none"> <li>Common law, UK and Singapore.</li> </ul>	<p>Leases are regulated by other legislation, including the CPA – and should not be included under section 14.</p>
Does section 14 of the CPA achieve the purpose of the <i>Green Paper</i> , the Bill, and the CPA? <sup>12</sup>	<ul style="list-style-type: none"> <li>No, section 14 of the CPA does not achieve the aims and purposes of any of these to protect the consumer in section 14.</li> <li>Singapore, and the UK fare better in this regard.</li> </ul>	<p>Amend the CPA and section 14 to achieve this purpose, namely protect consumer in section 14 for all foreseeable circumstances, without being too rigid. Do not place the consumer at a disadvantage, by obliging him or her to give notice, remain liable for payments, and even a penalty, when the supplier is guilty of default or non-performance. Do not limit the maximum duration of contracts.</p>

<sup>10</sup> See Ch 4 para 4.2.3.9; Ch 5 para 5.3.2.5; and Ch 6 para 6.4.

<sup>11</sup> See Ch 3 para 3.2.16; Ch 4 para 4.2.3.8; Ch 5 para 5.3.2.1.2; and Ch 6 para 6.3.7.

<sup>12</sup> See Ch 4 paras 4.2.2 and 4.2.3.7.13.

Aspect studied	Best practice system/s	Recommendation/s
Does section 14 reflect the aims in the UN Guidelines? <sup>13</sup>	<ul style="list-style-type: none"> <li>South Africa to an extent.</li> </ul>	SA has achieved the aims in general terms, consumers are better off than before, eg, the right to cancel at any time, but the rest of the provision does not meet the aims as it clearly disadvantages the consumer.
Constitutional values protected in section 14. <sup>14</sup>	<p>Other jurisdictions do not consider transformative constitutionalism.</p> <p>Even so, when measured against our Constitution the UK and Singapore fare better as regards the protection of consumers under fixed-term agreements.</p>	Not in section 14, amend to improve the position of the consumer regarding liability for payments and penalty when supplier defaults or fails to perform, abolish maximum duration of fixed-term contracts.
Freedom of contract, <i>caveat emptor</i> and <i>pacta servanda sunt</i> <sup>15</sup>	<ul style="list-style-type: none"> <li>Common law.</li> <li>Singapore – still tries to adhere to freedom of contract, for instance for the importance of <i>caveat emptor</i>, see Parliamentary debates. Also applies <i>pacta servanda sunt</i> in the Lemon Law.</li> <li>UK has freedom of contract to an extent in the CRA, eg, they retain the freedom of contract in the core exemption, and value <i>pacta servanda sunt</i>, for</li> </ul>	Consumer should have greater freedom, eg, to negotiate the duration of the fixed-term contract. Unfortunately, consumers are generally in an inferior bargaining position and therefore consumer protection legislation is necessary. However, consumers should still be cautious, and take responsibility for their own actions, and inform themselves of their rights and obligations.

<sup>13</sup> See Ch 2 para 2.6.

<sup>14</sup> See Ch 4 paras 4.2.2 and 4.4.

<sup>15</sup> See Ch 2 paras 2.2.6, 2.3.1, 2.4 and 2.5; Ch 3 para 3.2.2, 3.6; Ch 4 paras 4.2.3.7.7, 4.2.3.7.10, 4.2.3.7.11, 4.3.1, 4.3.2.5, 4.3.2.3, and 4.5; Ch 5 paras 5.3.2.7, 5.3.3, 5.5.3 and 5.6; and Ch 6 paras 6.3.4.2.7, 6.3.4.3.1.5, 6.3.5, 6.5.5, 6.6.1 and 6.6.3.

Aspect studied	Best practice system/s	Recommendation/s
	instance by implication in s 58 of the CRA regarding specific performance.	
Reasonable penalty. <sup>16</sup>	<ul style="list-style-type: none"> <li>Common law.</li> <li>Singapore and UK.</li> </ul>	Regulate this in the CPA or regulations by providing a formula to calculate the penalty, or a table indicating sliding scales based on the duration and amount in question, and disclose this amount in the agreement to ensure transparency.
Protection of smaller juristic persons. <sup>17</sup>	<ul style="list-style-type: none"> <li>UK when dealing in personal capacity.</li> <li>Singapore in certain circumstances.</li> </ul>	Smaller juristic persons should be protected because they could also be in a weaker bargaining position and in need of protection.

### 7.3.2 Table B

Aspect studied	Best practice system/s	Recommendation/s
Protection of consumers or effective enabling rights for consumers. <sup>18</sup>	<ul style="list-style-type: none"> <li>Common law, in theory.</li> <li>Singapore (although the name of the Act does not indicate it).</li> <li>UK.</li> </ul>	Consumers must play an active role with enabling rights in consumer related matters, not be passive (eg, the position under section 14(2)(b)(i)(bb)) – otherwise consumers will never achieve successful empowerment, confidence, and independence.

<sup>16</sup> See Ch 3 para 3.2.11; Ch 4 paras 4.2.3.7.8 and 4.2.3.7.10.

<sup>17</sup> See Ch 4 para 4.2.3.7.6; Ch 5 paras 5.3.2.1.1 and 5.4; Ch 6 para 6.3.4.2.1.

<sup>18</sup> See Ch 4 para 4.3.5; Ch 5 paras 5.2 and 5.6; and Ch 6 para 6.6.

Aspect studied	Best practice system/s	Recommendation/s
Standard-form contracts. <sup>19</sup>	<ul style="list-style-type: none"> <li>Common law has most scope for individual negotiation, although not necessarily fair in practice because of the consumer's inferior bargaining position.</li> <li>SA, Singapore, and UK, and other regimes the <i>contra proferentem</i> rule applies and courts have tried to implement various principles to correct the situation but no clear solution has been found.</li> </ul>	All bodies and courts must consider the lesser bargaining position of the consumer to achieve fair adjudication when standard-form contracts are concluded. The difference in bargaining position was taken into account when drafting consumer legislation. Consumers should therefore generally be in a better position when basing their claims on consumer legislation (s 14 of the CPA is an exception).
Parol evidence. <sup>20</sup>	<ul style="list-style-type: none"> <li>Singapore expressly excluded certain circumstances, but quite a wide exclusion.</li> <li>The UK, in the CRA by implication, also excludes the parol evidence rule in different sections.</li> <li>CPA in certain circumstances.</li> </ul>	Abolish the parol evidence rule expressly, not only in certain circumstances, for all consumer agreements. This is based on the weaker bargaining position of consumers. They should be allowed to present all evidence to prove their cases.
Lemon Law type protection. <sup>21</sup>	<ul style="list-style-type: none"> <li>Singapore, UK, and South Africa.</li> </ul>	All three jurisdiction have these provisions where goods do not conform to contract.
Effective adjudication by administrative councils. <sup>22</sup>	<ul style="list-style-type: none"> <li>Singapore appears to have the best system for adjudication.</li> </ul>	Amend and clarify legislation to ensure efficient and quick solution to consumer complaints.

<sup>19</sup> See Ch 2 para 2.5; Ch 4 para 4.2.3.3.

<sup>20</sup> See Ch 3 para 3.2.9; Ch 4 para 4.3.2.7; Ch 5 5.3.2.9.1, Ch 6 para 6.3.6.

<sup>21</sup> See Ch 4 para 4.3.3.4; Ch 5 para 5.3.2.7.

<sup>22</sup> See Ch 4 para 4.3.7; Ch 5 para 5.3.2.10; Ch 6 para 6.5.5.

Aspect studied	Best practice system/s	Recommendation/s
		Consumers should have direct access to court if they wish, although proof that ADR or other dispute settlement was attempted could be helpful in limiting overloading of the court system. The cost of court litigation and the time involved in litigating should be a self-regulating factor in all jurisdictions.
Flexibility. <sup>23</sup>	<ul style="list-style-type: none"> <li>• Common law.</li> <li>• Singapore.</li> <li>• UK.</li> </ul>	<p>Consumer protection provisions should be principle based – not as prescriptive as section 14. By being as prescriptive it deprives the consumer of the right to cancel when the seller defaults or fails to perform and the consumer remains liable for payments.</p> <p>It also prevents parties from contracting on a duration for agreements that would be to their advantage.</p>
Good faith, public policy, fairness, and ubuntu. <sup>24</sup>	<ul style="list-style-type: none"> <li>• UK.</li> <li>• Singapore.</li> <li>• Common-law position in SA could improve with transformative constitutionalism.</li> </ul>	In SA section 14 is not fair despite the noble purposes and aims to reform, and is contrary to constitutional principles, ubuntu, public policy. Rather look at the duration of contracts from a fairness point of view than being too prescriptive and in the process harming one or both parties. Consumer should not be liable for payment during notice

<sup>23</sup> See Ch 2 para 2.4; and Ch 3 para 3.2.3.

<sup>24</sup> See Ch 4 paras 4.3.2.4 and 4.4; Ch 5 para 5.3.2.2 on fairness; and Ch 6 para 6.3.4.3.1. Ubuntu is not a principle known in UK or Singapore, but can be included under public policy and the other principles.



Aspect studied	Best practice system/s	Recommendation/s
		period, or for a penalty when seller breaches the agreement.
Fairness, transparency, clarity, and the full disclosure of all essential and relevant information that could affect the consumer. Information-based consumer protection. <sup>25</sup>	<ul style="list-style-type: none"> <li>UK, Singapore.</li> <li>South Africa</li> </ul> <p>This is not a requirement for common-law contracts, unless bordering on fraudulent misrepresentation.</p>	The plain language provision in SA could be improved. Traders should always be obliged to make full disclosure of all relevant information in consumer contracts because of the weaker bargaining position and vulnerability of consumers.
Protect vulnerable consumers by taking special vulnerability into account in suitable circumstances. <sup>26</sup>	<ul style="list-style-type: none"> <li>South Africa.</li> <li>Singapore.</li> <li>UK (this concept is not yet fully developed in the CRA, but is mentioned in the UCTA).</li> </ul>	Yes, this is a requirement in the CPA, and should remain.
Political aims in legislation. <sup>27</sup>	<ul style="list-style-type: none"> <li>Singapore and UK.</li> </ul>	In general, it is not recommended to use legislation to effect political aims, especially when political regimes change regularly. It is preferable to stay true to the real purpose of legislation when formulating the aims and purposes of legislation to ensure long-term policy stability.
Educate consumers. <sup>28</sup>	<ul style="list-style-type: none"> <li>Singapore.</li> <li>UK.</li> </ul>	There should always be a drive to inform and educate consumers. This aspect could be improved in SA, eg, by a body similar to, and

<sup>25</sup> See Ch 4 para 4.3.2.5; Ch 5 paras 5.3.2.2 and 5.3.2.3; Ch 6 para 6.3.4.3.1.6.

<sup>26</sup> See Ch 4 paras 4.2.2.3, 4.3.5 and 4.4.5.3; Ch 5 paras 5.3.2.2 and 5.3.2.9.1; Ch 6 para 6.3.4.2.1.

<sup>27</sup> See Ch 4 paras 4.3.5 and 4.4.4; Ch 5 para 5.6; Ch 6 para 6.3.1.

<sup>28</sup> See Ch 4 para 4.3.5; Ch 5 paras 5.1, 5.2, 5.3.1 and 5.6; Ch 6 para 6.3.4.1.

Aspect studied	Best practice system/s	Recommendation/s
		<p>as effective as, the CASE in Singapore.</p> <p>In addition, provide explanatory notes and guidance on the CPA on the website of the NCC or NCT. In addition, the NCC should make advice freely available at the touch of a button, perhaps also draft a simple test and make it a prerequisite for concluding a consumer agreement to ensure the consumer understands the consequences and liabilities under a contract.</p>
Positive enforcement procedures. <sup>29</sup>	<ul style="list-style-type: none"> <li>• Singapore.</li> <li>• UK.</li> <li>• South Africa.</li> </ul>	Ensure that sufficient resources and effective procedures are available to make use of existing procedures. Section 69 should be simplified to make it easier to interpret, and provide easier access to enforcement procedures in practice.
Proactive powers. <sup>30</sup>	<ul style="list-style-type: none"> <li>• Singapore.</li> <li>• UK.</li> <li>• South Africa.</li> </ul>	Although the Commission has proactive powers in theory, it appears not to have the resources to implement these powers satisfactorily. Provide sufficient resources to give effect to proactive powers.
Burden of proof in consumer cases. <sup>31</sup>	<ul style="list-style-type: none"> <li>• Singapore.</li> </ul>	The burden of proof should vest in the supplier to be fair to the consumer.

<sup>29</sup> See Ch 4 para 4.3.7; Ch 5 paras 5.3.2.4, 5.3.2.9.5 and 5.3.2.10; and Ch 6 para 6.5.5.

<sup>30</sup> See Ch 4 para 4.3.5; Ch 5 paras 5.1, 5.3.2.10.

<sup>31</sup> See Ch 5 para 5.3.2.9.4.

The findings of this thesis will be illustrated by the analysis of a simple set of facts to summarise the consumer's most relevant basic rights and remedies in each of the consumer-law regimes analysed.<sup>32</sup>

### *7.4 Set of facts to illustrate the comparison*

Andrew approached ABC, a cell phone service provider, on 1 September 2019 to enter into a 36 months' cell phone agreement<sup>33</sup> for the purchase of a new cell phone-package for airtime, voice, data, and short messages.<sup>34</sup> Andrew's cell phone had been stolen, and he urgently needed a replacement cell phone by 4 September. This was explained to ABC. On 1 September, he signed a purchase agreement for the phone and received a copy of the agreement. ABC then informed him the specific phone was not in stock but would be available for collection and activation on 4 September at the latest. The monthly payment was scheduled to commence on 20 September 2019, and the payments would be debited to Andrew's account monthly, from that day onwards for the duration of the agreement. On 4 September ABC informed Andrew that it could not deliver the cell phone on 4 September. By 15 September 2019, Andrew had still not received his phone, or been contacted at all by ABC, despite several phone calls, e-mails, and visits to ABC's premises at regular intervals to enquire. Andrew wants to cancel the agreement urgently so that he can purchase another cell phone from a different supplier as he needs a cell phone urgently for work purposes.

The remedies and provisions applicable to these circumstances in the four consumer law regimes analysed, will now be applied to the set of facts to illustrate their respective impacts on Andrew's rights and remedies.

#### *7.4.1 The position under the common-law of contract in South Africa*

Under South African common law, Andrew will be permitted to enter into an agreement for 36 months as the duration of contracts can be freely negotiated. Therefore, Andrew will be able to afford the monthly payment.<sup>35</sup>

Based on the facts, Andrew can regard the conduct of the supplier as repudiation of contract, as ABC has expressly acknowledged that performance on the specified date was not possible, and has since, by way of its conduct, refused to perform. The advantage of repudiation is that Andrew can cancel the agreement without notice to ABC from 5 September 2019 onwards. This would be to his advantage. He can also stop or reverse the payment immediately, and enter into a contract with a different supplier.

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<sup>32</sup> The findings based on the set of facts will merely be listed and summarised, and will not be in the form of a detailed analysis or court judgment.

<sup>33</sup> He wants a longer duration to be able to afford a more expensive phone with improved features and fast internet connectivity, and large memory.

<sup>34</sup> Hereafter referred to as SMS, the acronym for Short Message System.

<sup>35</sup> Before the operation of the CPA.

#### *7.4.2 The position under the CPA in South Africa*

Under the provisions of the CPA Andrew would only be allowed to enter into an agreement for 24 months as the duration of contracts is limited in section 14(4)(a), read in conjunction with regulation 5 of the CPA. The shorter duration would mean higher monthly payments, or downgrading to a cheaper cellphone and service contract option.

Andrew would have to use the remedy in section 14(2)(b)(i)(bb),<sup>36</sup> and give ABC 20 days' notice of cancellation. He would remain liable for payments until date of cancellation, and the reasonable penalty in terms of section 14(3) read in conjunction with regulation 5.

Andrew would, of course, also retain his common-law rights and remedies in terms of section 2(10) of the CPA.<sup>37</sup>

#### *7.4.3 The position under the CPFTA in Singapore*

Andrew would be able to enter into a 36-month agreement because there is no limitation to the duration of contracts in Singapore.

As there is no provision equivalent to section 14 which specifies a notice period or renders him liable for payments till cancellation or penalties, he should be entitled to cancel immediately without incurring liability for payments. The reasonable time in Lemon Law applies only if the goods do not conform to the contract at time of delivery, which does not apply in our facts as there has been no delivery. As far as could be established, there is no judgment or precedent on this set of facts in Singapore. Singapore courts still consult English law and will probably refer to section 28(6) of CRA and allow the immediate cancellation of the agreement.

Andrew will also have the common-law rights or remedies as provided for in section 15 of the CPFTA.<sup>38</sup>

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<sup>36</sup> Theoretically he would be able to rely on the common law – see s 2(10), but as the provisions of the CPA will be inserted in the agreement, he will have to follow these provisions – in any case an average consumer would not be aware of his exact common-law rights.

<sup>37</sup> In theory, Andrew would also have his common-law rights and remedies available, although the average consumer does not have sufficient legal knowledge to realise that he or she retains these rights, to know exactly what they are, and which would be most beneficial. See s 2(10) of the CPA. A consumer can also base his or her case on unfairness in ss 48-52 under the CPA, then only the court will have jurisdiction. It is submitted that this is not suitable in these circumstances, and will take much longer and be more expensive even if he could have used his unfairness remedies. One also has to bear the restrictions on direct access to court in mind in terms of s 52(1)(b) of the CPA.

<sup>38</sup> However, the common-law of contract in Singapore was not analysed as it falls outside the scope of this thesis. See Ch 5 para 5.3.2.6.

#### 7.4.4 *The position under the CRA in the United Kingdom*

Andrew would be able to enter into a 36 months agreement in the UK, as there is no provision similar to section 14 of the CPA to limit the duration of fixed-term contracts. This also means that he need not give a specified period of notice (as under section 14 of the CPA) or remain liable for payments and penalties.

Andrew may, therefore, call on the remedy in section 28(6) of the CRA which entitles the consumer to treat the contract as at an end if the trader fails to deliver the goods as agreed under section 28(6)(b) or (c).

In addition, Andrew will also have his common-law rights and remedies as stipulated in section 28(13).<sup>39</sup>

#### 7.4.5 *Concluding remarks: Set of facts*

As illustrated by the above set of facts, Andrew will theoretically be in the best position under the South African common-law regime by basing his cancellation on the supplier's repudiation of contract, and under the CRA in the UK by relying on section 28(6) of the CRA. Both these regimes enable him to enter into a 36-month agreement which he can cancel immediately based on repudiation under South African common law, or in terms of section 28(6) of the CRA. He will be in the least favourable position under section 14 of the CPA. It is therefore submitted that it is imperative that section 14 be amended to allow consumers to contract freely as regards the duration of their contracts, and assist and protect consumers where a supplier defaults or fails to perform.

I now conclude by presenting matters arising from section 14 of the CPA and a few other issues directly affecting the position of the consumer in fixed-term contracts.

#### 7.5 *Conclusion*

Section 14 of the CPA protects the consumer where he or she decides of his or her own accord to cancel a fixed-term contract. He or she need not even offer a valid reason to the supplier for the cancellation. In effect this means that section 14 relaxes the maxim *pacta servanda sunt* for the consumer but not for the supplier.

However, as shown in this thesis, when the consumer needs to cancel a fixed-term agreement based on default or failure to perform by the supplier, he or she will be at a disadvantage under section 14 of the CPA. This disadvantage runs counter to the purpose of the section, which is to protect the consumer who is in an inferior bargaining position.

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<sup>39</sup> Similar to Singapore, the analysis of the common-law of contract in the UK falls outside the scope of this study.

When a reasonable penalty must be paid, the consumer is also at a disadvantage as he or she does not know, or cannot establish beforehand with certainty, how much the reasonable penalty will be.

A further disadvantage of section 14 is the limitation placed on the duration of fixed-term contracts. As the consumer can, in any event, terminate the agreement at any time, the provision serves no purpose other than to disadvantage the consumer in circumstances where the supplier defaults or fails to perform.<sup>40</sup>

Small juristic persons are also affected negatively in that they are not protected in the circumstances provided in section 14(1) despite the fact that they too can also be detrimentally affected by their weaker bargaining position in certain circumstances.

Consumers would benefit if fairness could be taken into account at all stages of the proceedings *mero motu* by courts and adjudicating bodies;<sup>41</sup> if the burden of proof were always to rest with the supplier;<sup>42</sup> and if the parol evidence rule were to be excluded by the CPA for all consumer-related disputes.<sup>43</sup>

Finally, and most importantly, when tested against the preamble to the CPA, the purpose and aims of the CPA, and the *Green Paper*, there can be little doubt that section 14 falls far short of achieving the purposes and goals envisaged for the Act – ie, to protect the consumer.<sup>44</sup> Barnes contends that the law should consider the limitations and lack of good judgement of the individual, and strive to balance these for the benefit of society<sup>45</sup> – this section 14 of the CPA has not achieved.

To conclude, consumer law should protect both the consumer and supplier fairly.

Based on the findings and conclusion in this thesis I now recommend principled amendments to the CPA to improve the position of the consumer specifically under fixed-term contracts in terms of the CPA, and in a few pertinent other matters.

### 7.6 Recommendations

Detailed amendments to the provisions of the CPA to protect parties under fixed-term agreements will not be proposed, as these would not provide the necessary relief and protection to consumers. Therefore, general, principle-based recommendations for the amendment of the regulation of fixed-term agreements under the CPA are suggested. The following measures as regards the regulation of

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<sup>40</sup> See the discussion in Ch 4 para 4.2.3.7.

<sup>41</sup> See Ch 6 para 6.3.4.3.1.1.

<sup>42</sup> See Ch 5 para 5.3.2.9.4.

<sup>43</sup> Ch 3 para 3.2.9; Bekker *LLD* 530-532.

<sup>44</sup> Ch 4 para 4.5.

<sup>45</sup> Barnes (2007) *WLR* 273.

fixed-term agreements, would greatly enhance the position, in particular of consumers, under the CPA:

- The maximum duration of fixed-term agreements should not be regulated by the CPA as the consumer can give notice to cancel the agreement at any time in terms of section 14(2)(b)(i)(bb) of the Act.
- In cases of default or failure to perform by the supplier, the consumer should be allowed an immediate cancellation right without being liable for payments owed to date of cancellation or a cancellation penalty in terms of section 14(3) read with regulation 5 of the CPA.<sup>46</sup>
- A formula or sliding scale for the calculation of the penalty in section 14(3), read with regulation 5 of the CPA,<sup>47</sup> should be included in the Act or regulations, and this penalty amount, or formula, should also be included in the fixed-term contract to enable the consumer to establish the amount he or she will be liable to pay in case of cancellation.
- The consumer should not remain liable for payments during the 20 days' notice, and not be obliged to pay a penalty, when the consumer bases his or her cancellation notice on material breach or malperformance by the supplier.
- A section similar to section 28(6) of the CRA should be inserted in the CPA to provide for cases of non-delivery or non-performance by suppliers.<sup>48</sup>
- Small businesses should be included in the protective mechanisms in terms of section 14 of the CPA.<sup>49</sup>
- The parol evidence rule should be abolished for all consumer-related disputes.<sup>50</sup>
- The burden of proof in consumer disputes should rest with suppliers.<sup>51</sup>
- Fairness should be considered *mero motu* by courts and adjudicating bodies at all stages of consumer proceedings.<sup>52</sup>

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<sup>46</sup> See Ch 4 paras 4.2.3.7.8 and 4.2.3.7.10.

<sup>47</sup> See Ch 4 para 4.2.3.7.10.

<sup>48</sup> See Ch 6 para 6.3.4.2.4.

<sup>49</sup> See the discussion in Ch 4 para 4.2.3.7.6; Ch 5 para 5.4.

<sup>50</sup> See the discussion of parol evidence in Ch 3 para 3.2.9; Ch 4 para 4.3.2.7; Ch 5 para 5.3.2.9.1, and Ch 6 para 6.3.6.

<sup>51</sup> See the discussion Ch 5 para 5.3.2.9.4 and Ch 6 paras 6.3.4.2.1 and 6.3.4.3.1.4 – there is no such provision in the CPA.

<sup>52</sup> See Ch 6 para 6.3.4.3.1.1.

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## **Chapter 7**

None

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